Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1646

WEST GULF MARITIME ASSOCIATION,
Petitioner

-versus-

FEDERAL MARITIME COMMISSION AND UNITED STATES OF AMERICA,
Respondents

PORT OF HOUSTON AUTHORITY,
Intervenor

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the District of Columbia Circuit

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PORT OF HOUSTON AUTHORITY,
Respondent

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the District of Columbia Circuit

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Petitioner West Gulf Maritime Association prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in the above cause on December 31, 1979, in which a rehearing was denied on January 21, 1980.

OPINIONS BELOW

The Court of Appeals (Appendix A, infra, p. A-1) affirmed without opinion the order of the Federal Mari-

time Commission (Appendix B, infra, p. A-3), which adopted the Initial Decision of the Administrative Law Judge denying the complaint of the West Gulf Maritime Association (Appendix C, infra, p. A-20).

The affirmance by the Court of Appeals is published at 610 F.2d 1001. Neither the Initial Decision of the Administrative Law Judge nor the order of the Federal Maritime Commission is yet reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, infra, p. A-1) was entered on December 31, 1979. Motion for rehearing was denied on January 21, 1980.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

A case believed to sustain the jurisdiction is *State of California v. United States,* 320 U.S. 577 (1944).

QUESTIONS PRESENTED

For some years prior to July 1, 1975, the Port of Houston (Texas) Authority did itself bill and collect from cargo interests its terminal and wharfage charges, which by its tariff are expressly made "liabilities of the owner of the cargo". Over the protest of the vessel interests, with an effective date of July 1, 1975, the Port Authority revised its tariff and billing practices to impose on the "vessel, its owners and agents" the collection of (which included billings) and payment to the Authority of the cargo terminal and wharfage charges, and to guarantee such collection and payment. Use of the Authority facilities was declared acceptance of this guarantee.

The West Gulf Maritime Association, the members of which are nearly all of the vessel agents and some of the deep-sea vessel owners using West Gulf ports including the Port of Houston, shortly after these tariff provisions were so changed, filed its complaint with the Federal Maritime Commission urging that the tariff provisions were not just and reasonable regulations and should be so found under the authority lodged with the Commission by Section 17 of the Shipping Act of 1916, 46 U.S.C. 816, and if the acceptance provision of the tariff constituted an agreement, unlawful as discriminatory under Section 15 of that Act. The Commission adopted the Administrative Law Judge's Initial Decision holding the tariff provisions lawful. From such Order of adoption petitioner appealed to the Court of Appeals for the District of Columbia Circuit, which affirmed the Commission's Order.

The questions presented are:

1. Whether in acting under the authority of Section 17 of the Shipping Act of 1916, 46 U.S.C. 816, the Federal Maritime Commission can lawfully find as just and reasonable and therefore lawful regulations of a terminal operator which are plainly invalid under the laws of the state which created the terminal as a state agency and subjected it to state law.

2. Whether the federal law which authorizes the Federal Maritime Commission to determine whether a terminal operator's regulations are just and reasonable prevails over the laws of the state of which the terminal is an agency and of which the regulations are violative, namely (1) the law of agency, in making without his consent a vessel agent the terminal's collecting agent of a third

person's debts, of (2) the state Statute of Frauds, in making one person (the vessel agent) liable for the debt of another (the cargo owner) without that person's consent in writing, and of (3) the law governing tariffs and contracts, in forcing a person entitled to use public facilities to agree to comply with otherwise invalid regulations under pain of being denied such use.

STATUTES AND REGULATIONS INVOLVED

1. *Shipping Act, 1916* (39 St. 728, Ch. 451, approved September 7, 1916; 46 U.S.C. 801, et seq.).

Section 1 (46 U.S.C. 801—Definitions):

"* * *

"The term 'other person subject to this act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

"The term 'person' includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country."

Section 17 (46 U.S.C. 816):

"* * *

"Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order

enforced a just and reasonable regulation or practice."

2. C.F.R., Title 46, Shipping: Chapter IV—Federal Maritime Commission.

Part 533—*Filing of Tariffs by Terminal Operators*

§ 533.6 Definitions.

"* * *

"(d) Definitions of terminal services:

"* * *

"(2) Wharfage: A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service."

3. *Texas Water Code* (Acts 1971, Ch. 58).

Section 62.078: Suits; Judicial Notice

"A district established under this chapter may, by and through the commission, sue and be sued in all courts of this state in the name of the district."

4. *Texas Business and Commerce Code,* Ch. 26. Statute of Frauds.

"Section 26.01 Promise or Agreement Must Be in Writing

"(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

"(1) in writing; and

"(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

"(b) Subsection (a) of this section applies to

"* * *

"(2) a promise by one person to answer for the debt, default, or miscarriage of another person;

"* * *."

5. Port of Houston Authority of Harris County, Tariff No. 8 (Thirteenth Revised Page No. 14, Item 3):

"3. Terminal Charges, set forth in Item No. 59, and Wharfage Charges, set forth in Item No. 65, are liabilities of the owner of the cargo; however, the collection and payment of same to the Port Authority must be guaranteed by the vessel, her owners and agents, and the use of Port Authority facilities by the vessel, her owners and agents, shall be deemed an acceptance and acknowledgement of this guarantee.

"3.2. As compensation to said vessel, her owners and agents, for such collection and payment of terminal and wharfage charges, as specified in Items 59 & 65, the Port Authority shall pay a fee of four per cent (4%) of the total terminal and wharfage charges incurred and billed to the vessel, her owners and agents.

"* * *."

STATEMENT

The Port of Houston Authority was created by the Texas Legislature as a municipality named the Harris County Houston Ship Channel Navigation District, its

name being changed in 1971 to the Port of Houston Authority of Harris County. By statute, Texas Water Code §§ 60.101, et seq., it is authorized to acquire and operate all the necessary docks and wharves of a port, and the Port of Houston is of course one of the principal ports of the United States.

For some years before July, 1975, the Port of Houston Authority itself billed the owners of cargo for the use by cargo of the port's wharf spaces and collected from them and their agents the moneys owed for this usage, termed "wharfage", as well as other terminal charges.

On June 1, 1975, following meetings with representatives of shipping firms using the port facilities, the Port Authority issued a revision of its Tariff No. 8, with the effective date of July 1, 1975, changing the methods of billing and collecting terminal and wharfage charges to impose upon the vessel, her owners and agents the collection of and payment to the Port Authority of these charges which by express tariff terms were liabilities of the owner of the cargo. Item 3, Port of Houston Authority Tariff No. 8, *supra*. Coupled with this obligation so imposed by the tariff change were the requirements that the collection and payment must be guaranteed, and that use of the port facilities was deemed an acceptance and acknowledgment of this guarantee.

The tariff provided further that the Port Authority would pay to the vessel interests 4% of the amounts collected.

Its members' protests against the changes having been to no avail, the trade association of which most of the vessel agents and some vessel owners were members, the petitioner here, on June 11, 1975, filed with the Federal

Maritime Commission its complaint, pursuant to Section 22 of the Shipping Act of 1916 (46 U.S.C. 821), particularly alleging the tariff changes were unjust and unreasonable under Section 17 of that Act (46 U.S.C. 816) and therefore unlawful.

It was particularly urged that the Port Authority, an agency of the State of Texas, was expressly made subject to the laws of the state by the statutory enactment that port authorities ("navigation districts") can sue and be sued in all courts of the state, that the tariff changes were unlawful under Texas law and hence could not lawfully be found just and reasonable by the Federal Maritime Commission.

After hearing, the Administrative Law Judge in his Initial Decision found the changes in the tariff just and reasonable and dismissed the complaint. This decision was adopted by order of the Commission. Appeal was taken to the Court of Appeals for the District of Columbia Circuit, and the Commission's Order was affirmed.

REASONS FOR GRANTING THE WRIT

The affirmance by the Court of Appeals of the decision of the Federal Maritime Commission has decided an important question of federal law which has not been settled by this Court. The Court of Appeals has upheld the Commission's decision that principles of state and common law do not control in the exercise of the Commission's discretionary powers granted to it by Section 17 of the Shipping Act of 1916 (46 U.S.C. 418) to determine what regulations of a marine terminal are just and reasonable, even though the terminal is a state-created agency expressly made subject to state law by statute.

The Commission holds that principles of state and common law may only be given consideration as "evidence" in reaching its decision of whether a regulation is just and reasonable. At page 14 of its decision, Appendix B, p. A-15, the Commission holds

> ". . . while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues . . .",

citing as authority only its own decision in *Terminal Lease Agreement at Long Beach, Cal.*, 11 F.M.C. 12, 26 (1967).

In essence this is obviously a direct holding that the discretionary power conferred on the Federal Maritime Commission by Section 17 of the Shipping Act of 1916 (46 U.S.C. 816) to determine when a regulation embodied in a marine terminal tariff is just and reasonable permits the Commission to uphold as "just and reasonable" tariff regulations which are contrary to principles of state and common law, here regulations adopted by an agency of the state which itself has been by statute made expressly subject to the laws of the state.

There is no case authority for this holding that regulations unlawful by virtue of common and state law are nevertheless just and reasonable and that their illegality is merely evidence which the Commission in its unlimited discretion is free to disregard.

The Port of Houston Authority is an agency of the State of Texas. It was created by the state legislature and given powers to operate one of the country's great ports. Acts 1927, 40th Legislature, 1st Called Session, p. 256,

Ch. 97; name changed from Harris County Houston Ship Channel Navigation District to Port of Houston Authority, Acts 1971, 62nd Legislature, p. 79, Ch. 42; Texas Water Code, §§ 60.101, et seq. There can be no doubt that it has been expressly by statute made subject to the laws of the State of Texas. The Port of Houston Authority of Harris County as a navigation district can sue and be sued in all Texas courts, the statutory language being

> "A district established under this chapter may . . . sue and be sued in all courts of this state . . ." Texas Water Code, Section 62.078.

Being subject to suit, this municipal agency is subject *ipso facto* to the laws governing citizens of the state.

The regulations here at issue are plainly repugnant to the principles of common and statutory law of the State of Texas:

First, it is settled law that the relationship of agency is a consensual one, and absent the consent or agreement of one person to act as the agent of another that person cannot lawfully become the other's agent. *Tarver, Steele & Co. v. Pendleton Gin Co.*, 25 S.W.2d 156 (Eastland Civ. App. 1930); *Bertrand v. Mutual Motor Co.*, 38 S.W.2d 417, 418 (Eastland Civ. App. 1931, err. ref.); 2 Tex. Jur. 2d p. 437, *Agency*, § 1; Restatement, Law of Agency, Second, § 15, p. 82. Here the regulation imposes on the vessel's agent the obligation to collect and pay to the port charges owned by the cargo owner, i.e., the carrier's agent is made the Port's agent to collect from a third person debts owed the port. The "agreement" making this an agency relationship is "deemed" made by the vessel's and her agents' use of the port facilities,

i.e., unless the vessel's agent agrees to act as the Port's collecting agent it is denied use of the port facilities. Plainly, such consent so implied is not the free consent necessary to establish an agency relationship, but one imposed by business duress and therefore a nullity. *McGowen v. Bush,* 17 Tex. 195, 201 (Tex. S.Ct. 1856); *Texas Power & Light Co. v. Doering Hotel Co.,* 147 S.W.2d 897 (Austin Civ. App. 1941), aff'd. 139 Tex. 351, 162 S.W.2d 938 (Tex. S.Ct. 1942).

Second, the tariff-imposed obligation to collect and pay the cargo owner's charges, and to guarantee such payment, i.e., be liable for such charges whether collected or not, is not an obligation embodied in written form and signed by the person to be charged but is an imposed undertaking, automatically arising from the use relationship, to answer for the debt of another. Such an undertaking not in writing nor signed by the person to be charged to answer for the debt of another is plainly repugnant to and a nullity under the Statute of Frauds. Tex. Bus. & Com. Code, Statute of Frauds, Section 26.01. The regulation is therefore unlawful on this ground also.

And thirdly the decision of the Commission upholding the regulation as just and reasonable on the ground that if a person desiring to use public facilities is free not to do so if he does not intend to or wish to comply with its tariff regulations of course begs the question of whether the regulations are lawful and is furthermore contrary to settled law governing tariffs and access to public utilities. Tariffs of course do not rest upon consent, and a person desiring to use facilities offered by a public utility must observe and cannot refuse to observe those of its tariff regulations *which are lawful. Boston & Maine R. v. Piper,*

246 U.S. 439 (1918); *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 59 S.Ct. 612 (1939). That is to say, while consent with respect to a tariff regulation is irrelevant, the regulations which must be observed must themselves be lawful.

Finally, other decisions of the Federal Maritime Commission show the Commission's determination to exercise its discretionary power under Section 17 of the Shipping Act without regard to principles of common and state law. In *West Gulf Maritime Association v. Port of Houston Authority, et al.*, F.M.C. Docket No. 74-15, petition for rehearing refused March 12, 1980, the Commission has held lawful as "just and reasonable" tariff provisions which make vessel agents personally liable for their disclosed vessel-principal's obligations. (The effect of this decision together with the instant one is to make vessel agents personally responsible for, i.e., liable for, *all* the principal charges of the port, those of the owners of cargo using the port and those of the vessels using the port. The only port revenues for which the vessel agents are not therefore personally liable as collecting agents for the ports and as guarantors of payment are the port's lease and rental revenues.) Another recent decision of the Commission in which it gave no deference to rules of common law in the exercise of its discretionary powers under Section 17 is its decision in *West Gulf Maritime Association v. City of Galveston (Galveston Wharves)*, F.M.C. Docket No. 77-56, decided September 14, 1979, reconsideration denied January 8, 1980, in which it has held the public utility which is a port can lawfully require some users of the port (vessel agents and stevedores) to carry considerable amounts of insurance as a condition of their being allowed access to port facilities, the settled

law being directly contrary to this decision, namely that a carrier, a public utility, cannot compel a customer to carry its own insurance. *Liverpool & G. W. Steam. Co. v. Phoenix Ins. Co.,* 129 U.S. 397 (1889); *Bradley v. Lehigh Valley R. Co.,* 153 Fed. 350 (2 Cir. 1907).

It is plain from the instant decision and these other recent decisions of the Commission that it interprets Section 17 of the Shipping Act to grant it unlimited discretion to determine what is a just and reasonable regulation, and that it may completely disregard otherwise applicable legal principles if it so chooses. The continuing exercise by the Commisison of its powers of review make the case an appropriate one for the exercise of this Court's discretionary powers.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT EIKEL
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

September Term, 1979

No. 78-2021

WEST GULF MARITIME ASSOCIATION,
Petitioner

v.

FEDERAL MARITIME COMMISSION, and
UNITED STATES OF AMERICA,
Respondents

PORT OF HOUSTON AUTHORITY OF
HARRIS COUNTY, TEXAS,
Intervenor

PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL MARITIME COMMISSION

BEFORE: WILKEY and MIKVA, Circuit Judges and
FLANNERY*, United States District Judge
for the District of Columbia

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Federal Maritime Commission,

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

and briefs were filed herein by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the order of the Federal Maritime Commission under review herein is hereby affirmed.

Per Curiam

For the Court:

/s/ GEORGE A, FISHER
George A. Fisher
Clerk

APPENDIX B

FEDERAL MARITIME COMMISSION

Docket No. 75-21

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY OF THE PORT OF HOUSTON, TEXAS

REPORT AND ORDER
ADOPTING INITIAL DECISION

BY THE COMMISSION: (Richard J. Daschbach, *Chairman;* Thomas F. Moakley, *Vice Chairman,* Karl E. Bakke, James V. Day and Leslie L. Kanuk, *Commissioners*)

This is a complaint proceeding instituted by West Gulf Maritime Association (WGMA or Complainant), alleging violations of Shipping Act sections 15 and 17 by the Port of Houston Authority (PHA). The Commission's Bureau of Hearing Counsel (Hearing Counsel) and

the Board of Commissioners of the Port of New Orleans (New Orleans) intervened in support of PHA.[1]

WGMA is a trade association composed of: (1) almost all steamship agents representing operators of deep sea cargo vessels using ports from Lake Charles, Louisiana to Brownsville, Texas; (2) the owners of some of these vessels; and (3) stevedoring firms associated with these vessel interests. Its complaint lies against revisions to PHA Tariff No. 8, effective July 1, 1975 which shifted the responsibility for billing and collecting wharfage charges from PHA to the vessel owners *and their agents,* imposing upon the latter the duty of acting as guarantors of collection, and allowing them a 4% "discount" on the charges collected to compensate them for their efforts and obligations in this regard. Compainant seeks an order declaring these provisions unlawful. Reparation is not requested.

PHA is an agency of the State of Texas charged with administering the public facilities at the Port of Houston under the Texas Water Code. Texas law also requires that PHA establish fees and charges sufficient to produce the revenue necessary to carry out its responsibilities and functions.

The hearing held before Administrative Law Judge Seymour Glanzer (Presiding Officer), consumed four days and generated 535 pages of transcript and 27 numbered exhibits. The Initial Decision served April 12, 1978, found for the Respondents. Exceptions were filed

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1. Two additional parties, Georgia Ports Authority and South Carolina Ports Authority, were granted leave to appear specially at the hearing of the case, but did not actually participate in the proceeding.

by WGMA. Replies to Exceptions were submitted by PHA, New Orleans and Hearing Counsel (hereinafter jointly referred to as "Respondent").

The Presiding Officer held that terminal tariffs are not agreements within the meaning of section 15.[2] He also determined that the PHA tariff provisions were not unjust or unreasonable, because the carrier's obligation to the shipper requires it to provide terminal facilities, the vessel agents separately *agreed* to be liable for the charges, and port efficiency is promoted by making the carrier's agent responsible for payment of the vessel's charges for the use of the facility.[3] The 4% allowance was found to be reasonable and compensatory to the vessel interests.

The Presiding Officer also decided that PHA violated its own tariff by continuing to collect wharfage charges directly from cargo interests on certain direct movements of bulk cargo pursuant to written lesases, without remitting the 4% commission to the vessel agents who had in fact billed for these charges pursuant to the tariff requirement. PHA was ordered to pay the allowance on these items to vessel interests, prospectively and retroactively, and to amend its FMC tariff to define the serv-

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2. *City of Galveston v. Kerr Steamship Co., Inc.*, 366 F.Supp. 280 (S.D. Tex. 1973) and *Rorie v. City of Galveston*, 471 S.W.2d 789 (Tex. 1971), were cited as dispositive of the instant section 15 question. Part 533 of the Commission's Rules (General Order 15; 46 C.F.R. Part 533) requires terminal operators to file tariffs for informational purposes on or before the tariff's effective date. Terminal tariffs may be implemented without prior Commission approval.

3. This practice was found to be prevalent at U.S. ports, *e.g.*, Galveston, Miami and Puget Sound, and virtually identical tariff provisions have been adjudged lawful by courts and the Commission alike.

ices rendered under the "terminal charge" provisions thereof.

Position of the Parties[4]

Complainant alleges the following errors in the Initial Decision: (1) The Initial Decision contains three erroneous findings of fact;[5] (2) the burden of proof was improperly imposed on Complainant when the Presiding Officer found a "rebuttable presumption of reasonableness" to be present; (3) PHA's terminal tariff provisions should have been held subject to section 15 filing and approval requirements; (4) the imposition of wharfage charges on vessel owners and agents is unreasonable and unjust regardless of whether agents have independently agreed to be liable for wharfage through credit arrange-

4. The Commission has promulgated rules regulating the presentation of exceptions to initial decisions which have not been complied with by the Complainant. The Exceptions filed by Complainant do not indicate with particularity the alleged errors, many of the Exceptions are not briefed, and numerous allusions to the record are unsupported by specific citations. Exceptions filed in violation of 46 C.F.R. 502.227(a) may be rejected without further consideration. *Inter-American Freight Conference Pooling Agreements,* 11 S.R.R. 48 (1969).

5. Complainant's specific exceptions were: (1) PHA performed unloading operations not loading; (2) PHA did have contacts with freight forwarders and custom house brokers; (3) PHA billed from service orders not delivery orders. It was not stated how these Exceptions (Nos. 1-3) relate to the ultimate issues or outcome of the case. The record does indicate that: (1) PHA engaged in loading operations as well as unloading operations (Tr., at 326), but stopped all operational functions by 1973; (2) If PHA had some limited contacts with freight forwarders and customhouse brokers as "persons shipping the cargo" the contacts were certainly not as pervasive as those of vessel owners and agents and were not of the type that would facilitate effective collection of wharfage as were those of the vessel interests; and (3) PHA billed by delivery orders (Tr., at 326), but service orders are directly based on delivery orders.

ments provided for their convenience; and (5) state law is determinative of the reasonableness of the PHA conduct in question.

In reply, Respondents contend that: (1) the factual errors alleged are irrelevant to the Initial Decision; (2) *Rorie, supra,* and *Kerr, supra,* are dispositive of the section 15 issue; (3) the *Boston Shipping* cases[6] are dispositive of the section 17 issue; (4) the record clearly supports the ultimate finding that PHA's wharfage practices are fair and reasonable.

The majority of WGMA's present arguments were raised before and resolved by the Presiding Officer. The Commission has reviewed the entire record in this proceeding and concluded that the result reached by the Initial Decision was essentially correct. Accordingly, the findings and conclusions of the Initial Decision shall be adopted and made a part hereof except as they may be modified or clarified by this Report.

Discussion

Prior to 1964, steamship agents in Houston were billed for wharfage charges which accrued to cargo. By 1964, pressure from WGMA and several carriers resulted in a change in the terminal practice wherein PHA assumed the burden of billing cargo interests directly. In February 1975, PHA initiated discussions with both cargo and vessel interests that eventually led, over WGMA's protests, to a new tariff being issued on June 1, 1975, effective July 1, 1975, reinstituting the practice of

6. *Boston Shipping Association v. Port of Boston,* 11 F.M.C. 1 (1967); *Boston Shipping Association v. Port of Boston,* 10 F.M.C. 409 (1967).

billing vessel owners and agents for wharfage charges. Although the tariff retained the language that the cargo was "liable" for the wharfage charges the vessel owners and agents were made responsible for billing and for payment as "guarantors" of collection.

The change in practice allows the number of invoices mailed to be significantly reduced by aggregating wharfage invoices on a per-ship rather than per-shipment basis and requiring the vessel interest to bill the individual cargo interests. Moreover, because vessel interests in Houston remain in direct contact with shippers and have more extensive physical control over the cargo through their retained stevedoring agents, they are in a better position to enforce collection. WGMA attempted to prove that the new practice was unfair and neither efficient nor better suited for collection enforcement, but the evidence presented on this point supported PHA's position and not WGMA's. (Tr. 96-110, 140-158, Ex. 20)

1. *Factual Issues*

WGMA excepts to three factual findings of the Presiding Officer (see footnote 5 above). There is merit in exception # 2 to the extent that there were some limited contacts between PHA and "persons shipping the cargo," but inasmuch as all three findings are irrelevant to the proper disposition of the proceeding, they need not be discussed further.

2. *The Presumption of Reasonableness and the Burden of Proof*

The Commission has recognized that the historical usage of the term "wharfage" referred to a charge against

either the cargo or the vessel[7] *or* both, in accordance with local customs.[8] Recognition of historical diversity might lead one to conclude that a *legal* "presumption" has been created favoring the reasonableness of any wharfage assessment practice, especially in light of the deference which may be afforded to the managerial expertise of terminal operators. See *In the Matter of Agreement No. T-2598*, 17 F.M.C. 286, 297 (1974). Such a conclusion would not be accurate, and was not made in the Initial Decision. The Presiding Officer's statement concerning the burden of proof (I.D., at 22) does not fairly indicate that Complainant bore any greater or different burden than that imposed by the Administrative Procedure Act, 5 U.S.C. 556(d), and section 502.155 of the Commission's Rules. The burden of proof in adjudicative proceedings is upon the party proposing the rule or order, unless otherwise provided by statute. Because WGMA is the party proposing to halt existing tariff practices of PHA, and, no statute places the burden of proof on the Respondent, the burden of proof is squarely on the Complainant.[9]

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7. 46 C.F.R. 533.6(d)(a), wherein wharfage is defined as a "charge assessed against cargo *or* vessel."

8. See *Baton Rouge Contractors, Inc. v. Cargill, Inc.*, 18 F.M.C. 140, 173 (1975), aff'd 530 F.2d 1062, 15 SRR 62 (D.C. Cir. 1976), *Report and Order in Docket No. 875*, SR 325:52, 30 Fed. Reg. 12681 (1965). In the instant case, the tariff imposed a form of liability on both cargo *and* vessel interests.

9. The practices in question do not require prior approval to be effective and terminal tariffs are not subject to suspension. In *Commonwealth of Puerto Rico v. Federal Maritime Commission*, 468 F.2d 872, 8 SRR 20,852 (1972), the court reversed a Commission ruling that the burden of proof will be imposed upon the proponent of a rule or order, in all instances, including carrier rate cases arising under Intercoastal Shipping Act section 3 and Shipping Act section 18(a) where no suspension of the rate had been ordered.

3. *The Section 15 Issue*

It is established Commission policy that business arrangements of the type ordinarily contained in terminal tariffs are not agreements subject to Shipping Act section 15. *Rorie v. City of Galveston,* 471 S.W.2d 789, 8 S.R.R. 20,713 (Tex. 1971); *City of Galveston v. Kerr Steamship Co., Inc.,* 362 F.Supp. 280, 8 SRR 20,925 (S.D. Tex. 1973).[10] The applicability of this policy to the present proceeding is clear. First, the terminal tariff is a unilaterally promulgated and uniformly applicable

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The court reasoned that there is a "common lore of basic approach in rate regulation" derived from the various federal enabling statutes wherein a regulated company seeking to increase its rates and having sole possession of the relevant evidence, has the burden of proof in any such proceeding. This case has been followed in other types of regulatory proceedings in a broader context, *International Harvester Co. v. Ruckelshaus,* 478 F.2d 615 (1973); *Alabama Power Co. v. Federal Power Comm.,* 511 F.2d 383, 391, n. 14 (1974); *Environmental Defense Fund, Inc. v. Environmental Protection Agency,* 548 F.2d 998, 1017 (1976). In the instant case, however, there is no indication that PHA has sole possession of all relevant evidence concerning the "reasonableness" of its collection practices.

10. In *Rorie,* the essential issue was whether a crane operator was a borrowed servant subject to the control of a stevedore who rented the crane with its operator, both furnished by the port, under a lease that, pursuant to the requirements of the terminal tariff, essentially placed him under the stevedore's control. The stevedore defended, in part, on the theory that the tariff, and hence the lease term controlled by the tariff, was void as it had not been approved by the FMC pursuant to section 15. On this issue the Texas Supreme Court accepted the opinion expressed in the Commission's "Memorandum Amicus Curiae" that terminal tariffs, as such, do not need section 15 approval to be valid and enforceable. This same rule concerning the section 15 status of terminal tariffs was again relied upon in a fact situation more analogous to the instant case. In *Galveston,* the port authority sued vessel interests for strike demurrage charged to them under the provisions of the terminal tariff. The vessel interests defended on the ground that the tariff provisions were unenforceable as they had not been approved by the Commission.

directive of the Port Authority.[11] Secondly, the "consent" language that Complainant relies on as indicative of an agreement is not an integral part of the tariff and adds no independent validity to the imposition of liability provisions.[12] Third, vessel agents are not an entity included in section 1 of the Act,[13] a fact which precludes any independent significance being given to the credit "agreements" negotiated between PHA and the vessel agents. Finally, even if the tariff were characterized as a section 15 agreement, the act of shifting liability from the cargo to the vessel interests would most probably be deemed a routine commercial adjustment rather than an agreement modification requiring prior section 15 approval. *Boston Shipping Association v. Port of Boston* (strike storage), 10 F.M.C. 409, 413-414 (1967); *Boston Shipping Association v. Port of Boston* (wharfage assessment), 11 F.M.C. 1, 5-6 (1967).

4. *The Section 17 Issue*

The core issue in this proceeding is whether the tariff provisions in question are unjust or unreasonable within the meaning of Shipping Act section 17, and on that

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11. The mere use of the terms "acceptance and acknowledgement" does not indicate a bilateral agreement within the meaning of section 15, but is more akin to the concept of "consent" or "acquiescence" to conditions unilaterally imposed without the exchange of consideration usually indicated by the term "agreement". See *Rorie* and *Kerr, supra.*

12. *See State of Israel v. Metropolitan Dade County, Fla.*, 431 F.2d 925, 927 (5th Cir. 1970), indicating that consent provisions of tariffs are "probably superfluous".

13. There must be an agreement between two or more persons subject to the Act before section 15 jurisdiction attaches. *Grace Line, Inc. v. Skips A/S Viking Line*, 7 F.M.C. 432, 448 (1962); *Hong Kong Tonnage Ceiling Agreement*, 10 F.M.C. 134, 140 (1966).

issue *Boston Shipping Association v. Port of Boston Marine Terminal,* 11 F.M.C. 1 (1967) is solidly on point. There, the Massachusetts Port Authority, by amending its tariff provisions, had shifted the imposition of wharfage charges from the cargo to the vessel. This was attacked by the Boston Shipping Association, a group of the same interests as comprise WGMA, on the ground that, *inter alia,* it violated section 17. The Commission essentially found that wharfage was an appropriate charge against the vessel interests because the terminal provided a service which furthered the carriers' transportation obligation to provide shippers with adequate terminal facilities.

WGMA seeks to distinguish the *Boston* wharfage case by showing that PHA *elected* to assess wharfage against cargo in 1964, and, having made that election, is estopped from now holding vessel interests liable as well. Nothing in *Boston Shipping* or any other authority cited by Complainant mandates such an irrevocable election by a terminal operator, and the Commission rejects this rigid interpretation of section 17. Shipping industry practices should be flexible and innovative as long as they are also fair. If it can be reasonable for vessel interests to be made *primarily* liable for wharfage as users of the service, it can be equally reasonable to make them jointly liable with the cargo interests (who are likewise users of the service).

The reasonableness of PHA's tariff amendment becomes manifest when scrutinized under section 17 standards. The test of reasonableness as applied to terminal practices is that the practice must be otherwise lawful, not excessive, and reasonably related, fit and appropriate to

the ends in view. *Investigation of Free Time Practice—Port of San Diego, Cal.*, 9 F.M.C. 525, 547 (1966); *Boston Shipping, supra,* at 9; *Assembly Time—Port of San Diego,* 13 F.M.C. 1, 13-14 (1969); *Agreement No. T-2598—Port Canaveral and Luckenbach S.S.*, 17 F.M.C. 286, 300 (1974).[14] A just and reasonable allocation of charges is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service. *Boston Shipping Association v. Port of Boston,* 10 F.M.C. 409, 414 (1967). There is no question that vessel owners, agents and cargo interests are "users" of the terminal facilities and derive a benefit therefrom, at least in a vicarious sense. It is irrelevant that steamship agents do not directly use the facility, they are agents for persons who do. The only things that actually physically use the facilities are inanimate objects (the ships and the goods) and the loading and unloading crews. It would be contrary to all common sense to say that only those physically using the facility can be liable for the charges associated therewith. *Boston Shipping Association* (strike storage), *supra,* at 416-417.

There is no question of the level or apportionment of the charges presented here as this issue has not been raised in the proceeding. It only remains to determine whether the practice is reasonably related to the ends in view. PHA's objective is to promote overall port efficiency by reducing the costs of facility operations. The practices of imposing the billing and collection of wharfage on the

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14. The level of charges must also be reasonably related to an actual service performed or a benefit conferred on the person charged. *Volkswagenwerk A.G. v. F.M.C.*, 390 U.S. 261, 282, 8 SRR 20,109, 20,132 (1968); *Indiana Port Commission v. Federal Maritime Commission,* 521 F.2d 281, 15 SRR 45, 49 (1975); *Baton Rouge Contractors, Inc. v. Cargill, supra,* at 174.

party who can most efficiently effectuate and enforce the same, insuring all revenues due the port are collected by extending the liability for wharfage to all persons who derive a benefit from the use of the wharves, and looking first to the parties over whom the port has the highest degree of collection leverage, all bear a reasonable relation to these stated ends.

Several other West Gulf Ports follow these practices, particularly the Port of New Orleans where a similar tariff provision has proven to be most reasonable, efficient and capable of achieving "the ends in view" (Ex. 23). Personnel from PHA testified as to the advantages of the new system and the disadvantages of the old (Tr., at 322, *et seq.;* Ex. 20), indicating that duplicitious re-billing was eliminated, credit arrangements were facilitated, problems of determining responsible parties were eliminated, and the volume and costs of invoicing wharfage charges were drastically reduced. Conversely, WGMA personnel admitted (Tr., at 127, *et seq.;* 184, *et seq.*) that by utilizing good business practices no substantial losses were incurred from uncollectible wharfage charges, and no appreciable added expenses had actually been experienced.

The record does not contain substantial evidence indicating that WGMA is experiencing undue costs or risks under the new collection system. Moreover, the burden of establishing the unreasonableness of the practice is squarely upon WGMA.

5. *Agency Law and State Law Contentions*

Complainant relies heavily on principles of legal duress, business coercion and agency in an attempt to establish

that the terms of the tariff under attack are unlawful under section 17, as a matter of law. That is, they assert that if the tariff provisions run afoul of state law concerning business duress and coercion principles or common law agency principles that this is a *per se* violation of section 17.[15]

The simple answer to both these assertions is that, while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a showing that these principles directly apply to Shipping Act considerations. *Terminal Lease Agreement at Long Beach, Cal.*, 11 F.M.C. 12, 26 (1967). WGMA has not demonstrated that the alleged transgressions of Texas or common law have such an application, and the Commission could end its inquiry into these Exceptions at this point.

The Presiding Officer, however, dealt with these "issues" at length, and to ensure full exposition of WGMA arguments, some discussion of these matters is warranted.

As to the issue of duress under Texas law, the gist of Complainant's theory appears to be that the imposition of terms of a terminal tariff upon a party using the terminal when deemed onerous by that party constitutes unlawful duress and business coercion. PHA, however, is a public facility open to all comers willing to be sub-

15. Federal Court decisions concerning agency law principles establish *state* rather than federal law. Although certain specific subjects of "federal common law" may still exist following *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), see annotation 31 L.Ed.2d 1006, agency principles are determined by the law of the situs of the agency arrangement. RESTATEMENT OF CONFLICT OF LAWS, sections 342, 343; 3 Am. Jur. Agency, section 8.

ject to its terms and conditions of usage. If one finds PHA's tariff terms unbearable, the record indicates that one may simply utilize the private facilities at the port and eschew the public facility.[16] All who do decide to use the public facilities are users of their own free will. If WGMA's theory were accepted by the Commission, no terminal tariff at any public facility in the State of Texas would be enforceable unless each and every user of the facilities found all terms acceptable to it. This does not appear to be the import of Texas law. *Rorie* and *Kerr,* both Texas decisions, allowed the imposition of unilaterally promulgated tariff terms upon parties unwilling to accept the force of law behind those provisions.[17]

As to the issue of the application of agency law principles in finding vessel agents lawfully liable under the tariff, the factual circumstances of this case fail to indicate anything illegal about PHA's practice. The best justification under agency law to find the vessel agents liable for wharfage charges is their prior course of conduct, normal business practices, and continuing and voluntary use of the facility, all of which indicate that they have in fact separately agreed to be liable. The prior practice between the parties has been that the agents

16. Of thirteen private facilities at Houston the record discloses that only Manchester Terminal Company has not adopted the subject PHA Tariff Provision (Ex. 10, Tr. at 133-138). The other private facilities are: Adams Terminal, Anchortank, Inc., Bethlehem Steel Corp., GATX Terminals Corp., Goodpasture, Inc., Greens Bayou Terminal, Houston International Terminal, Intercontinental Terminal, New Terminal Warehouse, Oiltanking of Texas, Wisco Terminal, Todd Shipyard Corp.

17. See also Annotation 79 ALR 655, wherein it appears that there must be the threat of *serious* financial injury, no *viable alternative* business course of conduct and a *lack of resort* to the courts, to constitute unlawful business coercion.

established independent credit arrangements with the port on behalf of their principals with the understanding that PHA was extending the credit "knowingly and exclusively"[18] *to the agent* rather than going through the burdensome routine of having the vessel owners post adequate security for each ship berthing at the port. (Tr., at 330-331, Ex. 20.)

Even without the prior course of conduct, agency law does not prohibit an offeror of services to the public to condition the rendering of services to any party upon that party agreeing to be personally liable for the charges regardless of whether they are using the service on their own behalf or for a principal, disclosed or not. That is, there arises an agreement outside the scope of the agent's agreement with its principal that is not controlled by agency principles. This is exactly the situation presented in this case and is the principle embodied in the tariff impliedly agreed to by the agents when utilizing the facility. *Folgner v. Italian Line,* 383 F.Supp. 816, 818 (D.C. C.Z. 1974). There is nothing to prevent the agent from obtaining an indemnification agreement from its principal or requiring the principal to furnish advance security directly to PHA.

6. *Miscellaneous Matters*

Several issues initially pursued by WGMA, were not raised on Exceptions and will be deemed to have been abandoned. However, to make the record complete a summary of these matters is in order. The 4% commis-

18. This would seem to fulfill the requirements of liability under Texas agency law as stated by WGMA in its Exception No. 31 (Exceptions, at 9) citing *American Appraisal v. Constantin,* 985 S.W.2d 1003 (Ft. Worth Civ. App. 1936).

sion to the vessel interests was found to be compensatory by the Presiding Officer. Nothing in the record suggests error in this regard. Similarly, the 4% commission due the vessel interests on certain direct movement bulk cargoes of terminal lessees still billed directly by PHA should be paid in accordance with the tariff provisions for those items actually billed by vessel interests. The tariff should be amended to reflect the actual practice at which time no further payments need be made in this regard. Also the definition of "Terminal Charge", a "service" for which users of the facility are assessed, should be stated in PHA's tariff, pursuant to 46 C.F.R. 533.6, as all services for which users of a terminal are billed must be defined in the tariff.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted, as supplemented herein, and the Exceptions of West Gulf Maritime Association are denied; and

IT IS FURTHER ORDERED, That the complaint of West Gulf Maritime Association is denied; and

IT IS FURTHER ORDERED, That within 30 days following the service of this Report, the Port of Houston Authority amend its Terminal Tariff No. 8 to accurately reflect the actual practices employed in direct billing and collection of wharfage charges on certain direct loading movements of bulk cargo or to cease and desist from following collection practices not stated in said tariff; and

IT IS FURTHER ORDERED, That the Port of Houston Authority promptly pay collection commissions, without interest, on direct movement cargoes to all vessel interests that have complied with Terminal Tariff No.

8's provisions regarding the billing and collection of wharfage charges on such movements between July 1, 1975 and the 30th day following the service of this Report; and

IT IS FURTHER ORDERED, That the Port of Houston Authority file with the Commission's Secretary within sixty (60) days from the service date of this Report a full accounting of all collection commission payments made pursuant to the preceding ordering paragraph; and

IT IS FURTHER ORDERED, That the Port of Houston Authority amend its Terminal Tariff No. 8 to include a definition of "terminal charge"; and

IT IS FURTHER ORDERED, That this proceeding be discontinued.

/s/ FRANCIS C. HURNEY
Francis C. Hurney
Secretary

(SEAL)

APPENDIX C

(Federal Maritime Commission)
(Served April 12, 1978)
(Exceptions Due 4-27-78)
(Replies to Exceptions Due 5-12-78)

FEDERAL MARITIME COMMISSION

NO. 75-21

WEST GULF MARITIME ASSOCIATION

v.

PORT OF HOUSTON AUTHORITY OF THE PORT OF HOUSTON, TEXAS

PHA's practices and tariff provisions making the vessel, vessel owners and vessel agents responsible for payment of wharfage charges found not to violate sections 15, 16 First or 17 of the Shipping Act.

Complaint ordered dismissed and proceeding ordered discontinued.

PHA ordered to comply with provisions of its tariff requiring payment of 4% allowance to vessel interests on wharfage charges collected by PHA from lessees at PHA's terminal.

Robert Eikel, for West Gulf Maritime Association, complainant.

F. William Colburn, for Port of Houston Authority, respondent.

Edward Schmeltzer, Edward J. Sheppard, J. Thomas Esslinger and *George Weiner,* for the Board of Commissioners of the Port of New Orleans, intervenor.

John Robert Ewers and *Lizann Malleson Longstreet,* as Hearing Counsel.

Sam H. Lloyd, for Georgia Ports Authority, appearing specially.

Marion S. Moore, Jr., for South Carolina Ports Authority, appearing specially.

INITIAL DECISION[1] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

This is a complaint proceeding, filed June 11, 1975, pursuant to the provisions of section 22 of the Shipping Act, 1916,[2] by West Gulf Maritime Association (WGMA), complainant, alleging violations of sections 15 and 17 of the Shipping Act, 1916,[3] by Port of Houston Authority of the Port of Houston, Texas (PHA),[4] respondent, and requesting that specified tariff matter published by the respondent be declared void, unjust, unreasonable, discriminatory and unlawful and further re-

1. This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 277, Rules of Practice and Procedure, 46 CFR 502.227).

2. 46 U.S.C. 821.

3. 46 U.S.C. 814 and 816.

4. PHA's proper name is Port of Houston Authority of Harris County, Texas.

questing the issuance of an order requiring respondent to cease and desist from putting that tariff matter into effect or acting in conformity with that tariff matter or seeking to enforce that tariff matter against complainant's members and requesting still further the isuance of such orders as may be necessary to secure compliance with the law by respondent. Reparation is not requested.

PHA answers that the tariff matter is just and reasonable and not discriminatory and that it is not violative of any provision of law.

WGMA is a trade association composed of (1) almost all the steamship agents representing operators of deep sea cargo vessels using the ports of the Gulf of Mexico from Lake Charles, Louisiana, to Brownsville, Texas, inclusive, (2) the owners of some of those vessels and (3) stevedoring firms whose employees load and unload those vessels. The complaint is on behalf of the steamship owner and agent members engaged in business operations at the Port of Houston.

PHA is a governmental agency and body politic of the State of Texas, established under authority of Article 3, Section 52 of the Texas Constitution. Under provisions of the Texas Water Code[5] PHA is authorized, among many other things, to acquire land and purchase, construct, enlarge, extend, repair, maintain, operate or develop wharves and docks and all other facilities or aids incidental to or useful in the operation or development of its ports or waterways or in aid of navigation and commerce in the ports and on the waterways (Section 60.-101). PHA is also empowered to prescribe fees and

5. The cited provisions of the Texas Water Code formerly appeared in Article 8247a, Sections 1 and 2, V.T.C.S.

charges, to be collected for use of its land, improvements and facilities. The fees and charges must be reasonable, equitable and sufficient to produce revenue adequate to pay expenses set forth in the Code (Section 60.103).

In particular, WGMA's complaint lies against certain revisions in PHA's tariff dealing with billing and collection of "wharfage charges assessed by the respondent against cargo moving outbound and inbound across respondent's wharves" which were issued June 1, 1975, and became effective July 1, 1975. The complaint places in issue the following tariff provisions which appear in PHA's Tariff No. 8 at Thirteenth Revised Page No. 14, Item 3:

> 3. Terminal Charges, set forth in Item No. 59, and Wharfage Charges, set forth in Item No. 65, are liabilities of the owner of the cargo; however, the collection and payment of same to the Port Authority must be guaranteed by the vessel, her owners and agents, and the use of Port Authority facilities by the vessel, her owners and agents, shall be deemed an acceptance and acknowledgement of this guarantee.
>
> 3.2 As compensation to said vessel, her owners and agents, for such collection and payment of terminal and wharfage charges, as specified in Items 59 & 65, the Port Authority shall pay a fee of four per cent (4%) of the total terminal and wharfage charges incurred and billed to the vessel, her owners and agents.
>
> 3.3 Wharfage charges on cargo shall be assessed on the basis of manifest wesights, unless otherwise provided herein.[6]

6. Although mentioned in the complaint, the validity of Item 3.3 is not assailed.

Wharfage is defined in the tariff[7] as follows:

> A charge on any commodity placed in a transit shed or on a wharf, or passing through, over, or under a wharf; or transferred between vessels, or loaded to or unloaded from a vessel at a wharf, regardless of whether or not wharf is used. It does not include sorting, piling, weighing, handling, insurance, custom charges, revenue stamps, or fees of any nature imposed by the State or Federal Government against the shipments or vessels transporting them.

Neither the definition of wharfage, the wharfage charge nor the levels of charges for wharfage set forth in Item No. 65 of PHA's tariff[8] are under attack. Therefore these matters are not in issue. However, it may be observed that both the definition and method of computation of wharfage charges appear to comport with the requirements of regulation.[9]

Terminal Charge is not defined in PHA's tariff. As is the case with wharfage, neither the terminal charge itself nor the level of any charge thereunder in Item No. 59 is in issue. According to the tariff,[10] terminal charges are in addition to wharfage charges, but there are only

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7. PHA's Tariff No. 8, First Revised Page No. 11.

8. *Id.*, beginning at Twenty-Third Revised Page No. 72.

9. The Commission's Regulations for Filing of Tariffs by Terminal Operators define wharfage as follows, 46 CFR 533.6(d)(2):

> A charge assessed against the cargo or *vessel* on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service. (Emphasis supplied.)

10. PHA's Tariff No. 8, Thirteenth Revised Page No. 58.

two commodities, automobiles and bananas, subject to terminal charges. WGMA proffered no testimony or argument in opposition to the terminal charge.

There are two intervenors, Hearing Counsel and the Board of Commissioners of the Port of New Orleans (New Orleans). New Orleans is an agency of the State of Louisiana created for the purpose of regulating and promoting the commerce and traffic at that port and administering and maintaining its public wharves and other terminal facilities. Both participated in the proceeding. Two other persons were allowed to make special appearances at the hearing. They are the Georgia Ports Authority and South Carolina Ports Authority. Neither of them participated in the proceeding.

There were four days of hearing. The record comprises 535 pages of transcript and 27 numbered exhibits. All participating parties submitted briefs.

Positions of the Parties

WGMA urges that the guarantee in Item No. 3 and another provision of PHA's tariff, Item No. 2, entitled Application and Interpretation of Tariff,[11] which has been in effect since, at least, 1959, and which provides—"The use of the waterways and facilities under jurisdiction of the Navigation District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified and be governed by all rules and regulations herein contained."—are nullities because lawful tariff provisions do not rest upon consent and

11. *Id.*, Original Page No. 12.

therefore should be given no consideration in the determination of the complaint; that those provisions, which have not been approved by the Commission, constitute a violation of section 15; that only those tariff provisions which are required by law to be included within a tariff are binding upon persons dealing with a public utility or government agency. Therefore tariff provisions like those in Item Nos. 2 and 3 which are not required to be filed and which impose upon vessels and vessel's agents the duty to bill for and collect from cargo interests wharfage charges owing to the port by such interests and the duty to guarantee payment of those charges are illegal and void; that tariff provisions requiring vessels and vessels' agents to bill and collect cargo charges constitutes duress and business coercion, therefore those provisions are void and unenforceable; that Item No. 3 is discriminatory, unjust and unreasonable, hence unlawful and in violation of sections 16[12] and 17 of the Shipping Act. In its reply brief WGMA also urges that Item Nos. 2 and 3 have the effect of unlawfully making vessels and vessel's agents the agents of the port without consent.

PHA asserts that the tariff provisions constitute fair and reasonable measures adopted by it in the discharge of statutory duties placed upon it in the operation of public port facilities and that the tariff provisions and wharfage billing practices are not in violation of sections 15 and 17. New Orleans argues that the tariff provisions are necessary to the efficient operation of ports, are not

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12. 46 U.S.C. 815. N.B. The complaint does not invoke section 16. Even if evidence of undue preference or prejudice had been adduced, complainant made no motion to amend the complaint or to have the pleadings conform to the proof.

precluded by General Order 15[13] and are not discriminatory or unreasonable and that questions of Texas Law are irrelevant. Hearing Counsel contends that the tariff matter is consistent with the requirement of law, are not discriminatory, preferential, prejudicial or unreasonable and are lawful.

Historical Background of the Tariff and Comparison with Other Ports' Tariffs

Going back as far as 1933 and continuing to 1964, wharfage charges were billed to and collected from the vessels, vessel owners or vessel agents by PHA.[14] During that time, the tariff provision relating to wharfage provided (Item 3(c)):

> All vessels and their owners receiving any commodity on a wharf or in a transit shed, or loading or unloading any commodity while at a wharf, hereby contracts to pay and are responsible for the wharfage on such commodities, at the rate provided herein, to be collected either from vessels, their owners or their agents.

In 1964, in response to requests made by vessel owners and agents, PHA changed its wharfage billing and collection practices by shifting liability for wharfage charges to the owner of the cargo and placing responsibility for payment of invoices upon the cargo owner or his agent —the freight forwarder on outbound cargo and the customs broker on inbound cargo. This was accomplished by substituting a new Item 3(c), effective April 1, 1964. It provided:

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13. 46 CFR 533.1 et seq.

14. Formerly, PHA was known as Harris County Houston Ship Channel Navigation District.

> Liability for wharfage charges, set forth in item number 65, will be the responsibility of the owner of the cargo and the Port Authority will invoice and collect from such owner or authorized agent.

About 1972 or 1973 PHA made another changeover in its practices. Until then it had performed as an operating terminal, loading outbound cargoes aboard vessels. When it stopped those terminal operations, PHA advised vessel owners and agents that it was contemplating a further change in its wharfage billing practices by way of reversion to tariff provisions similar to those in effect until April 1964. PHA did not implement that change immediately. The matter remained dormant for a while, but PHA's interest in effectuating the change revived in 1975. There then ensued numerous discussions involving PHA officials and staff members, vessel owners and agents, freight forwarders and others. The outcome of those discussions was a revocation of Item 3(c) as it existed since 1964. It was replaced by Item Nos. 3 and 3.2, the tariff provisions in issue here.

The net effect of Item Nos. 3 and 3.2 is to assess wharfage charges on the cargo according to its manifest weight, but to make the vessel, its owner or agent, directly responsible for collection and payment of those charges to PHA. In consideration of the collection and payment efforts of vessel owners and agents, PHA commits to pay them compensation at the rate of 4% of the total of wharfage and terminal charges collected by PHA.

Tariff provisions, virtually identical to Item Nos. 3 and 3.2, are published by New Orleans. However, New Orleans pays only a 3% fee for collection and payment to vessel owners and agents. The practice of looking to

vessel owners and agents at New Orleans dates back to a time at least before World War I, and probably goes back to the creation of New Orleans in 1896.

Provisions similar to Item No. 3 appear in tariffs published by the Port of Lake Charles, Louisiana, Port of Corpus Christi, Texas, and Port of Port Arthur, Texas, since, at least, 1968, 1974 and 1972, respectively.

WGMA vessel owner and vessel agent members serve one or more of the ports named above.

Facts

PHA reinstituted the practice of looking to vessel owners and agents for collection and payment of wharfage charges on the basis of staff recommendations for various reasons. Generally, PHA took into account that collecting from the cargo interests was inefficient because it required redundant administrative procedures in order to insure collection; and that collecting from cargo interests was costly because of that redundancy and because all too often PHA was unable to collect the charges from cargo interests—sometimes not at all and other times only after repetitious solicitation—due mostly to the fact that many cargo interests were beyond the jurisdiction of Texas for the service of legal process. PHA also recognized that while it had no direct contact with the persons shipping the cargo, shipowners and their agents almost invariably did. E.g., 99% of the cargo transported out of New Orleans and PHA by Hellenic Lines Limited, a ship owner, was booked by Hellenic following solicitation of that cargo from shippers by Hellenic employees or Hellenic's network of agents.

The particular difficulties encountered by PHA under the tariff provisions in effect from 1964 to 1975 and the anticipated benefits under the new tariff provisions were explained by PHA's Controller.

Under his supervision in 1974, there were 52 employees whose major responsibility was insuring that PHA be paid the charges due PHA for the use of its facilities. In that year PHA spent more than $400,000 in salaries and fringe benefits for those employees. Approximately half of those salary expenses were occasioned by the need to redundantly oversee the billing, collection and audit of wharfage charges due PHA from cargo interests.

The Comptroller pointed out the more notable deficiencies of the old system.

A basic document used by PHA in billing wharfage charges was the delivery order. But, delivery orders, prepared by the cargo interest or cargo representative, frequently showed estimated volume. Thus, because wharfage charges under the tariff are based on actual volume, a second invoice often became necessary, but the required adjustment could not be made until PHA received a copy of or audited the vessel manifest which showed the actual volume of the shipment. By the time PHA obtained the manifest or audited it, the vessel was at sea.

Vessel owners or their agents in Houston or other cities often booked shipments for cargo interests which had not established credit or had no previous business experience with PHA. This created processing delays because PHA service orders could not be issued until credit arrangements were made. Making those arrangements entailed added expense to PHA. Anomalously, in view of

the nature of the complaint, in most instances those arrangements were made with WGMA vessel owners and vessel agents who volunteered to accept on behalf of the cargo interests the billing of wharfage and other terminal charges to their credit acounts with PHA.

Vessel owners or their agents permitted stevedores to load outbound cargo directly from the overland surface carrier to the vessel and inbound cargo directly from the vessel to the overland surface carrier without advising PHA nor providing PHA with information identifying the cargo interests responsible for payment of wharfage charges. These facts would come to PHA's attention only after a detailed audit of the vessel manifest. But by the time the audit could be conducted, a task which in itself involved substantial clerical time and effort and which was often subject to further delay because of failure to provide the manifest promptly, collection of wharfage charges from cargo interests would become difficult even in the case of cargo interests located in Houston. If the cargo interest was located beyond Houston or had no local representative or had no credit arrangement with PHA, collection was frequently impossible or uneconomical and had to be written off. This drawback to the old system was particularly severe in the case of inbound cargo because, once the customs broker had released the cargo from the dock his relationship with the cargo interest terminated and there remained no local cargo interest to look to for payment.

Not only did the practices under the former rule adversely affect PHA's efforts to collect wharfage promptly and efficiently, but they also impeded PHA's wharf demurrage efforts because PHA had to rely upon documents

in the possession of vessel interests which were either not turned over to PHA in time to bill the cargo interests while the shipment was at the terminal or did not become available until PHA's audit.

The changeover to billing the vessel interests was productive of immediate benefits to PHA. This was revealed statistically. During the months of April, May and June 1975, the last three months prior to the change. PHA issued 14,888, 17,269 and 15,320 original wharfage invoices, respectively. Afterwards, in July and August 1975, PHA issued but 6,149 and 3,888 original wharfage invoices, respectively. Also, during April, May and June 1975, PHA issued 772, 567 and 753 wharfage adjustment invoices, respectively. However, in August 1975, only 467 wharfage adjustment invoices were issued. It was estimated that the number of adjustment invoices will be further reduced to about 100 per month after all the pre-changeover adjustments have been accounted for.

Another estimate, based upon 1974 statistics shows that the net annual reduction in PHA's expenses to be achieved by the changeover will amount to $195,000. The 4% allowance to vessel interests will absorb about $155,000 of that sum per year. Thus, PHA is expected to save $40,000, annually, on salaries, in addition to insuring collection of all wharfage charges due it.

Although vessel owners and vessel agents will incur greater bookkeeping expenses under the changeover, most, if not all, of those expenses will be recouped by the 4% allowance. This is evidenced by the experience of one vessel owner operating at both New Orleans and PHA. At New Orleans, that vessel owner would have been fully compensated by the 3% allowance provided by New Or-

leans, had it recovered all wharfage charges from cargo interests. Because that vessel owner will not release inbound cargo until all wharfage is paid,[15] it is the collection of outbound cargo wharfage, primarily from freight forwarders, which makes the 3% allowance less than fully compensatory. But that vessel owner sometimes does not press its claim for outbound wharfage out of fear of loss of business from freight forwarders who represent the cargo interest in the selection of water carriers.

There is ample evidence that the 4% allowance will be fully compensatory to vessel owners and vessel agents if they collect all wharfage charges from cargo interests and if PHA pays the 4% allowance on all wharfage it collects. In some instances PHA does not pay that allowance, that is—where, under written lease agreements between PHA and lessees, the wharfage is paid directly to PHA by the lessee. However, vessel interests are not informed of those lease provisions. Consequently, they do incur the expense of billing PHA's lessees for wharfage and collection until the lessee advises that the charges have been paid directly to PHA. Contrary to the requirements of its tariff, PHA has not paid the vessel interests the 4% allowance in those situations. PHA stated that it would correct this situation which it had overlooked prior to the hearing. As of the time of this initial decision no correction has been made.

The Statutes

As pertinent, section 17 provides:

> Every * * * other person subject to this act shall establish, observe, and enforce just and reasonable

15. The practice of not releasing inbound cargo until wharfage is paid is followed by at least one vessel agent at PHA.

regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

As pertinent, section 15 provides:

That every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommondations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

* * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; * * *

DISCUSSION AND CONCLUSIONS

A: GENERAL

The underpinning of WGMA's complaint alleging that PHA's tariff violates sections 15 and 17 of the Shipping Act seems to lie in a deep rooted conviction that, under both the common law and the Shipping Act, terminals are bound to look only to the cargo and never the vessel for payment of wharfage charges and that any departure from that principle somehow must be a violation of law. WGMA's preoccupation with its theory, for which it cites no supporting common law authority nor any Commission or Court decisions under the Shipping Act, is what leads WGMA astray in this proceeding. Whatever the common law may have been concerning liability for wharfage,[16] the common law has been preempted by the statutory provisions of the Shipping Act and the rules and regulations promulgated pursuant to that Act. See, e.g., *Adams Express Co. v. Croninger,* 226 U.S. 491 (1913); *Boston and Maine RD. v. Hooker,* 233 U.S. 97 (1914). It is well settled by case law and the Commission has sanctioned by regulation that wharfage is an appropriate charge against the vessel. Indeed, tariff provisions, of the very type in issue here, have received the approbation of the Commission and the Courts in the past. I will explain.

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16. Inasmuch as, historically, the ocean common carrier's transportation obligation extended beyond carriage on the high seas and included the obligation to provide terminal facilities which could be made accessible to consignors and consignees of cargo, see discussion, *infra,* it is difficult to perceive how, at common law, the cargo interests and not the vessel interests would be considered primarily liable for wharfage charges.

B: WHARFAGE AS A CHARGE AGAINST THE VESSEL

Those persons, including governmental instrumentalities, like PHA, who operate terminal facilities are "other persons subject to this [Shipping] Act" as defined in section 1 of that Act, 46 U.S.C. 801. The quoted phrase covers "any person not included in the 'term common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." Thus, "there can be no doubt that wharf storage facilities provided at shipside for cargo which has been unloaded from water carriers are subject to regulation by the Commission." *California v. United States,* 320 U.S. 577, 586 (1944). "[A]s the expert body established by Congress for safeguarding this specialized aspect of the national interest, [the Commission] may, within the general framework of the Shipping Act, fashion the tools for so doing." *Id.*

Under its mandate, the Commission formulated regulations governing the filing of tariffs by terminal operators. 46 CFR 533.1 et seq. Recognizing that wharfage is a terminal service which is provided "in furtherance of the *carriers* obligation," see *Boston Shipping Assn. v. Port of Boston Marine Terminal,* 11 F.M.C. 1, 9 (1967), the Commission determined that "wharfage is an appropriate charge against the vessel." *Id.* Consequently, the regulations governing terminal operators' tariffs expressly sanction the practice of assessing wharfage charges against vessels. See text of 46 CFR 533.6(d)(2) at n. 9, *supra,* in which wharfage is defined as a "charge assessed against the cargo or *vessel.*" The rationale of the regulation and

Boston Shipping Assn. conforms to principles laid down in a host of other cases, as will be seen.

The validity of assessing wharfage against the vessel interests, under section 17, is subject to a test of reasonableness, that is— whether the practice is "fit and appropriate to the end in view." *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525, 547 (1966); *Boston Shipping Assn. v. Port of Boston Marine Terminal, supra.* Reasonableness under this standard turns on whether the charge is assessed by the terminal against the user of the service. In other words, "A just and reasonable allocation of charges under section 17 is one which results in the user of a particular service bearing at least the burden of the cost to the terminal of providing the service (citations omitted)." *The Boston Shipping Assoc., Inc. v. Port of Boston,* 10 F.M.C. 409, 414 (1967). Failure to impose wharfage charges on users causes mischief because it makes that service parasitic on other terminal rates. "Where the users of a particular service do not provide their share of essential terminal revenues a disproportionate share of the burden is unjustly and unreasonably shifted to users of other terminal services." *Id.*

In urging that wharfage should be assessed against the cargo interests (that is, shipper, consignee, freight forwarder, broker or other cargo representative), complainant appears to lock on the words in PHA's tariff that "Wharfage Charges . . . are liabilities of the owner of the cargo" as dispositive of the question of user. However, complainant is in error for this assumption overlooks the nature of the obligation of the carrier to the shipper. It is well settled that the carrier's responsibility to the cargo does not end when the vessel ties up at the dock.

Judge Prettyman stressed the extent of the obligation in *American President Lines, Ltd. v. Federal Maritime Board,* 317 F.2d 887, 888 (D.C. Cir. 1963):

> Ships bringing transoceanic freight into port are required by their transportation obligation, absent a special contract, to unload the cargo onto a dock, segregate it by bill of lading and count, put it at a place of rest on the pier so that it is accessible to the consignee and afford the consignee a reasonable opportunity to come and get it. This was settled by the courts many years ago. (Footnote citations omitted.)

Thus, on inbound cargo, the vessel's obligation does not end until it makes a tender of the cargo for delivery to the consignee at the pier. Afterwards, "Consignees are obligated, after notice and reasonable opportunity to come and pick up their goods at the pier." *American President Lines, Ltd. v. Federal Maritime Board, supra;* this allowance by the carrier to the consignee of a reasonable opportunity to come and get 'his cargo is what is known in the industry as 'free time'."[17] *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525, 529 (1966).

Responding to an argument similar to the one urged here by complainant, the Commission offered a further explanation of why the obligation for wharfage lies with

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17. Wharf demurrage charges, or those charges which accrue after the expiration of free time, are not involved in this proceeding. Therefore, it is unnecessary to discuss the circumstances, like strikes, under which the carrier's obligation might be extended beyond normal fre time periods. Cf. *The Boston Shipping Assoc., Inc. v. Port of Boston, supra; The City of Galveston v. Kerr Steamship Co., Inc.,* 362 F. Supp. 280 (S.D. Tex. 1973), aff'd 503 F.2d 1401 (5 Cir. 1974), Cert. denied 420 U.S. 975 (1975).

the vessel, despite the euphemism that wharfage is a liability of the cargo, in *The Boston Shipping Assoc., Inc. v. Port of Boston, supra,* 10 F.M.C. at 416-417:

> When the cargo is in free time, the terminal facility—the pier—is being provided by the terminal to the carrier so that the carrier may discharge its full transportation obligation to the consignee. It is the duty of the carrier to provide this service to the consignee and it has chosen to do so through an arrangement with the terminal. No one would argue that the carrier should pay the terminals' cost of providing the pier for the free time period itself.
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> That the services in question were supplied to the cargo is in one sense a valid statement. In transportation all the services, be it the actual carriage or the variety of attendant services, are performed for or supplied to the cargo, the ultimate object being to move the cargo from the point of origin to its ultimate destination. But the cargo cannot be divorced from the persons owing obligations to it. In the past when considering the proper allocation of terminal charges, it has been customary to divide terminal services into two general categories: those performed for the "vessel" and those performed for the "cargo." While we have no desire to change this customary usage, it must always be borne in mind that the cargo is not some separate entity which is itself capable of paying for services rendered. The charges must always be paid by some person standing in a prescribed relationship to the cargo.[18] Thus,

18. By way of footnote, the Commission indicated it assumed "that convenience alone led to the substitution of 'cargo' for the term 'shipper or consignee' depending *inter alia* whether the shipment was inbound or outbound." 10 F.M.C. at 417. n. 10. Another

> where the terminal is the intermediate link between the carrier and the shipper or consignee, one of these two persons must pay the terminal's cost of providing the services rendered. The question here is which of these two should pay the charge in issue. [Footnotes omitted.] We would place the burden upon him who * * * owes an undischarged obligation to the cargo.

Heretofore in this discussion, the carrier's obligation for wharfage has been canvassed in the context of inbound cargo. But it is settled that the same principles are applicable to outbound cargo as well. The vessel is required, as part of the obligation of carriage, to provide terminal facilities for the receipt of outbound cargo and to afford a reasonable free time period for the shipper to assemble the cargo prior to loading aboard ship. Therefore, the terminal becomes, in effect, the agent of the carrier for this service. Accordingly, it is appropriate to place liability for payment of outbound wharfage on the vessel—the user of the service. See, e.g., *Investigation of Free Time Practices—Port of San Diego, supra,* in which the Commission explained, 9 F.M.C. at 539:

> It is the carrier's obligation not only to afford the necessary free time but also to provide terminal facilities adequate to render such free time meaningful and realistic. *Intercoastal Rates To and From Berkeley, Etc.,* 1 U.S.S.B.B. 365 (1935). This obligation may be fulfilled either by the carrier itself or

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aspect of the origins of the custom of assessing charges against "cargo" is offered in *Middle Atlantic Conference v. United States,* 353 F. Supp. 1109 (D.C. D.C. 1972). There, the court expressed the belief it "is an outgrowth of a legal concept, peculiar to contracts of shipment at maritime law 'under which the vessel is deemed to contract' in respect to the freight, rather * * * than with the shipper." 353 F. Supp. at 1114.

through an agent. *Intercoastal Investigation, 1935,* 1 U.S.S.B.B. 400 (1935).

> The tariffs of the ocean carriers in the foreign offshore trades calling at San Diego make no provision for free time, nor do the carriers provide wharfs or piers at San Diego for the receipt and delivery of cargo. [Footnote omitted.] The port of San Diego provides these facilities, and the free time in question is provided for in its tariff. Under these circumstances the port becomes in effect the agent of the carrier for the performance of these obligations of the carrier * * *.[19]

Next, complainant urges that the tariff provisions placing liability on the vessel interests are unlawful because those provisions are not required by law to be filed and therefore have no binding effect. In support of this argument complainant cites a provision of the Commission's terminal tariff rules, 46 CFR 533.3 and three court cases, *Port of Tacoma v. S.S. Duval,* 364 F.2d 615 (9 Cir. 1966); *Pacific S.S. Co. v. Cackette,* 8 F.2d 259 (9 Cir. 1925), cert. den'd 46 S.Ct. 203; *Middle Atlantic Conference v. United States, supra.* The cited cases are inapposite. The rule, as I read it in conjunction with 46 CFR 533.2 and 46 CFR 533(d)(2), mandates a state-

19. Cf. *Intercoastal S.S. Frt. Ass'n. v. N.W.M.T. Ass'n.,* 4 F.M.B. 387 (1953), in which the principles, expressed earlier in *Terminal Rate Increases—Puget Sound Ports,* 3 U.S.M.C. 21 (1948), and *Terminal Rate Structure—California Ports,* 3 U.S.M.C. 57 (1948), that allocation of terminal charges is to be determined by the nature of the transportation obligations of the carrier to the shipper or consignee and the identity of the user of the terminal services, were reaffirmed. Accordingly, upon findings that the terminal operators, in receiving lumber for outbound movements, were performing a service for shippers and not for carriers, it was held improper to allocate the charge to the carriers. The allocation of charges for a similar service provided by terminal operators for general cargo for the use of carriers was left undisturbed.

ment in the tariff concerning the identity of the person liable for wharfage.

Complainant's statement of the rule of law in the three cited cases is, of couse, correct. In *Middle Atlantic Conference v. United States, supra,* the court expressed the rule this way, 353 F. Supp. at 1122:

> A long line of cases have held under various transportation acts that attempts by carriers to engraft onto a tariff a gratuitous unilateral provision not contemplated or required by the statute authorizing the filing of tariffs is entirely ineffectual.

Thus, in *Middle Atlantic Conference,* the court affirmed a decision of the Interstate Commerce Commission prohibiting motor carriers from specifying in their tariffs that particular persons, generally referred to as warehousemen, who were not named in the bill of lading as consignors or consignees of shipments, are liable under certain circumstances for charges for undue detention of trucks being loaded or unloaded at their premises. Obviously, the carriers sought to create a new rule of liability by means of a tariff and thereby to effectuate a legislative change in the law which places liability for motor transportation charges on the parties to the contract for transportation.

In *Port of Tacoma v. S.S. Duval, supra,* the court held invalid a lien arising from a tariff provision making vessel interests liable for wharfage because the tariff provision had the effect of nullifying a notice provision of the Maritime Lien Act, 46 U.S.C. 971-975, and particularly, section 973.[20] However, the court struck down only the

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20. That provision has since been deleted. See discussion in *Gilmore & Black, The Law of Admiralty,* §§ 9-41 through 46a at 672-688 (Second Ed. 1975).

tariff provisions which conflicted with the lien law. It did not invalidate another tariff provision virtually identical to the one at issue here.

In *Pacific S.S. Co. v. Cackette, supra,* the court held a tariff provision invalid which, contrary to the applicable law at that time, required a passenger to give written notice of a baggage claim within ten days after landing.

Unlike the circumstances in the three cases cited by WGMA which involved tariff provisions in conflict with the law, here, in my opinion, the Commission's rules implementing section 17[21] constrain terminal operators to set forth in their tariffs the identity of the person or persons liable for payment of charges for the different services provided. Under 46 CFR 533.3 terminal operators are required to file a "tariff showing all its rates, charges, rules, and regulations relating to or connected with the receiving, handling, storing, and/or delivering of property at its terminal facilities." That rule also carves out an exemption from terminal charges covered by *negotiated* agreements, as follows: *"Provided, however* that rates and charges for water carriers pursuant to negotiated contracts * * * need not be filed for purposes of this part."

Clearly then, absent a negotiated contract with vessel interests, and none has been shown on the record, the tariff must show the rates and charges for wharfage. Recalling that 46 CFR 523.6(d)(2) defines wharfage

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21. The regulations governing the filing of tariffs by terminal operators, 46 CFR 533.1 et seq., are promulgated pursuant to the general rule making authority of section 43 of the Shipping Act, 1916, 46 U.S.C. 841a, which provides: "The Commission shall make such rules and regulations as may be necessary to carry out the provisions of this Act."

as a charge assessed against *cargo* or *vessel,* it is imperative for PHA, or any other terminal facility similarly situated, to have its tariff distinguish, by tariff rule or regulation, with clarity, whether it is the cargo or vessel interest which is liable for wharfage. Otherwise one of the major purposes of the terminal tariff regulations—keeping the Commission and the public informed of terminal practices[22]—could not be satisfied. Thus, the

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22. See 46 CFR 533.2, which provides:

> The purpose of this part is to enable the Commission to discharge its responsibilities under section 17, Shipping Act, 1916, by keeping informed of practices and rates and charges related thereto, instituted and to be instituted by terminals, and by keeping the public informed of such practices.

WGMA also focuses a part of its argument on Item No. 2 of PHA's tariff, entitled "Application and Interpretation of Tariff" which provides:

> The use of the waterways and facilities under jurisdiction of the Navigation District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways to pay all charges specified and be governed by all rules and regulations herein contained.

WGMA urges that Item No. 2 is a nullity because tariffs have the force and effect of law, see *Atlantic Coast Line R. Co. v. Atlantic Bridge Co.,* 57 F.2d 654, 655 (5 Cir. 1932), and do not rest upon agreement or consent. It is correct to say, as WGMA does, that consent cannot alter the effect of a tariff, but that principle and the supporting authorities cited by WGMA have no application to Item No. 2. *Pittsburg & C. Ry. Co. v. Fink,* 250 U.S. 577 (1919), one of the cases cited by WGMA, will serve to illustrate the misapplication of the principle to PHA's tariff.

In *Pittsburgh v. Fink,* the consignee argued that he did not have to pay the railroad's tariff charges because of an agreement he had with the consignor. The Court held that the agreement could not "lessen the obligation of the consignee to pay the legal tariff rate when he accepted the goods." 250 U.S. at 582. It is obvious that WGMA misreads the rule of that case which stands for the proposition that a separate contract entered into between a consignor and consignee for payment of transportation charges did not supersede the carrier's tariff provisions invoked by the bill of lading, insofar as the liability imposed by law for the payment of transportation

tariff provision serves to comply with, rather than being in defeat of regulation, and is entirely necessary and proper.

Given the carriers' transportation obligation to provide accessible terminal facilities, including the use of the wharf, for inbound and outbound cargo, in my opinion 46 CFR 533.6(d)(2) should be construed to mean that ordinarily the wharfage charge in a terminal tariff must be stated as the liability of the vessel interests because the carriers' vessels ordinarily are the users of the wharves.[23] On the other hand, where there is a special

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charges is concerned. This is so because "the provisions of the tariff enter into and form a part of the contract of shipment." *Boston & Maine RD v. Hooker, supra,* 233 U.S. at 111. (This Commission's tariff rules applicable to domestic and foreign commerce require carriers to include specimen copies of their bill of lading in their filed tariffs. 46 CFR 531.5(b)(8)(vii), 46 CFR 536.5(d)(8).)
But, by custom and usage, ports, like PHA, do not enter into a written contract with vessels for the use of port and terminal facilities. The obligation of the vessel interest to PHA arises from the use of PHA's facilities and this is all Item No. 8 establishes. In so providing in its tariff, PHA carries out its obligation, under 46 CFR 533.2, to keep the Commission and the public informed of the terminal's practices. I cannot visualize any benefits to be gained from upsetting an efficient practice by requiring PHA to eliminate Item No. 2 from its tariff and force it to enter into written contracts instead. I do foresee that if written contracts were required to be substituted for Item No. 2 that there would ensue a more costly and less efficient operation with resultant additional expenses to shippers. See discussion concerning vessel agents, *infra.*
Moreover, tariff provisions, substantively the same as Item No. 2 of PHA's tariff, have been upheld in the past by the Commission and by the courts. See, e.g., *Selden & Co. v. Galveston Wharves,* 7 F.M.C. 679 (1964); *City of Galveston v. Kerr Steamship Co., Inc., supra,* and other cases referred to in the text.

23. Accord, *Terminal Rate Structure—Pacific Northwest Ports,* 5 F.M.B. 53 (1956), "Where such services are performed, the terminal is entitled and obliged to recover compensation therefor, *from the person for whom the services have been performed.*" 5 F.M.B. at 57.

contract[24] (see *American President Lines, Ltd. v. Federal Maritime Board, supra*) or special circumstances (as with lumber shipments in *Intercoastal S.S. Frt. Assn. v. N.W.M.T. Assn., supra*) the liability for wharfage may be that of the cargo or cargo interests.

This means that in a proceeding to determine the lawfulness of a terminal tariff provision placing liability for payment of wharfage on the vessel interests, there arises a rebuttable presumption of reasonableness of that tariff provision and the burden of proof to overcome that presumption lies with the party assailing the tariff provisions.[25] Here, WGMA adduced no evidence to overcome that presumption by showing that vessel interests were not the users of the wharves or that there existed special contracts or other special circumstances tending to establish the unreasonableness of the wharfage liability pro-

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24. But, see *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 326 (1957), amending 5 F.M.B. 53, in part. Recognizing that the language in the earlier decision, quoted in n. 23, *supra*, could be construed to require terminals to bill the cargo interest in a case where the contract of affreightment involves a tackle to tackle rate, but noting, too, that terminals are not parties to that contract and are unable in any given case to determine the identity of the party ultimately liable, the Board authorized the terminals to bill and collect from the carriers all handling and service charges incurred between point of rest and ship's hook, both inbound and outbound. Point of rest is defined as "that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading." 46 CFR 533.6(c).

25. Under the Administrative Procedure Act, 5 U.S.C. 551 et seq., which governs proceedings before regulatory agencies and the Rules of Practice of this Commission, 46 CFR 502.1 et seq., the burden of proof is on the proponent of a rule or order. "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d). To the same effect, see 46 CFR 502.155.

visions in PHA's tariff. WGMA has failed its burden of proof.

C. THE AGENT'S LIABILITY FOR WHARFAGE

Although not entirely clear, WGMA seems to contend, as it has in a related proceeding against PHA and other Texas ports,[26] that whatever may be the responsibility of the vessel to the terminal, the vessel agent cannot be made responsible for payment of vessel charges to the terminal because he is an agent for a known principle. The rule of law relied upon is well established. "Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable *unless he agreed to be so.*" (Emphasis supplied.) *Whitney v. Wyman,* 101 U.S. 392 (1880). The rule has been construed to mean that vessel agents acting for a vessel (rather than for the vessel owner) act for a known principal—the theory being that by naming the ship, the agent has sufficiently disclosed the identity of the principal for whom he acted. See, e.g., *Valkenburg, K.-G. v. The S.S. Henry Denny,* 295 F.2d 330, 333 (7 Cir. 1961);[27] *Instituto Cubano De Establizacion Del Azucar v. The SS Theotokos,* 155 F. Supp. 945, 948 (S.D.N.Y.

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26. Docket No. 74-15, *West Gulf Maritime Association v. Port of Houston Authority, et al.,* pending initial decision.

27. In *Valkenburg,* the court said, "The identity accorded by maritime law to a ship as a person also charges those who deal in maritime commerce with the knowledge as to the ownership and operation of a named ship which accepted maritime publications as Lloyd's Registry of shipping would disclose. 295 F.2d at 333. But see *Port of Tacoma v. S.S. Duval, supra,* also *Puamier v. Barge BT1793,* 395 F. Supp. 1019, 1030 (E.D. Va. 1974), where the court commented, "The Supreme Court and various lower courts have held repeatedly that the true ownership of a vessel is not dependent upon its registry." (Citations omitted.)

1957); *Hudson Trading Co. v. Hasler & Co., Inc.*, 11 F.2d 666, 667 (S.D.N.Y. 1926). The implication which WGMA would draw from this familiar rule of agency law is that its agent members, acting for vessels, are immunized from becoming liable for the vessel's obligation to pay for wharfage and that PHA's tariff provisions holding them liable somehow amount to unlawful coercion and duress under Texas law. I am unable to reach the conclusion suggested by WGMA.

To begin with, it should be understood that "public wharves, piers and marine terminals are affected with a public interest." *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission,* 444 F.2d 824, 828 (D.C. Cir. 1970).[28] Because terminals are of vital importance to transportation, they may be deemed public utilities for purposes of regulation by this Commission. *Id.*, at 829. The court continued, also at 829:

> The power thus conferred [on the Commission] is to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system.

Earlier, that court explained what is meant by an efficient terminal system, *Id.*, at 828:

> Efficiency of manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned.

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28. See also *Perry's Crane Service v. Port of Houston Authority of Harris County, Texas,* 16 SRR 1459, 1484 (1976) (initial decision), partially adopted, ____SRR____ (February 25, 1977).

If a terminal is, in effect, a public utility, it follows that it must render service—including the use of its facilities like berths and wharves—to all vessels which call at the port. However, this does not mean that the terminal may not fix some standards which must be adhered to in order to promote efficiency of the terminal's operation. This requires the terminal to take such action as is necessary, whether by the device of a tariff or otherwise, to insure that berthing, unloading, loading and vessel departure be accomplished with dispatch so as not to impede the flow of traffic and the movement of cargo. In the same manner, the terminal is required to ensure that it is paid for the use of its facilities so that costs properly allocated to the vessel do not, by nonpayment, become a charge on other terminal services or impair the terminal's ability to keep, maintain and improve its facilities so that it may continue to serve the public interest.[29]

As seen, wharfage is the liability of the vessel interests and PHA is required to collect wharfage charges from those interests. But, may the tariff make the vessel agent,

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29. This mandate is also imposed by the State of Texas. PHA, as a state agency, acts in a fiduciary capacity and is bound by the Texas Constitution to operate essentially on a cash basis. Article 3, Section 50 of the Texas Constitution provides:

> The Legislature shall have no power to create or to lend, or to authorize the giving or lending, of the credit of the State, in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever for the payment of liabilities, present or prospective, of any individual, association of individuals, municipal or other corporations whatsoever.

Article 11, Section 3, of the Texas Constitution, provides:

> No county, city or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit. . . .

as an agent for a known principal, liable for the principal's obligations? The teaching of *Whitney v. Wyman, supra,* is that this may be done if the agent agrees to be bound. In my opinion, vessel agents have agreed, both factually and legally, to accept the obligation to pay PHA for wharfage.

It is clear that PHA deals not with vessel owners, except those owners who maintain a physical presence at the port, but with their agents. Agents usually represent more than one shipowner and are in daily contact with the port to obtain berth assignments for their principals' vessels. At Houston, the agents, alone, know the identity of the principal and the nature and ownership of the cargo carried by the vessel and the berthing and wharfage requirements. PHA relies on the expertise of those agents in assigning berths and wharves to the vessels they represent. Of at least equal importance, PHA cannot afford to nor does it, in fact, rely on the credit of absentee vessel owners for payment of charges allocated to vessels. Rather, PHA deals with the agent and relies on the credit of the agent for payment of the vessel's charges.

It must be understood that shipowners are located around the globe and if PHA were to be forced to bill and collect for charges incident to each vessel call, the administrative cost of obtaining payment would soar and charges would correspondingly increase. Moreover, many of the charges cannot be accurately determined until after the vessel is gone. It would then be a difficult task, indeed, to collect without the security of the vessel.[30]

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30. Under some circumstances the vessel itself may not be subject to a lien, see *Gilmore and Black, The Law of Admiralty, supra; Port of Tacoma v. S.S. Duval, supra.*

Without that security, the port would be placed in the position of maintaining law suits around the world in order to collect its charges. It is manifest, then, that PHA and the vessel agents mutually understand their undertaking with each other. Instead of delaying the berthing, unloading, loading and departure of the vessel to await the filing of a bond or other security by the vessel owner to guarantee payment of charges, PHA extends the use of its facilities to the agent's vessels in reliance on the agent's credit and its implied agreement to be bound by the terms of the tariff.

In other words, what has occurred is that PHA, New Orleans and other terminals, which publish similar tariff provisions making the vessel agents liable for vessel charges, have let it be known they recognize that vessel agents hold themselves out to be agents for known principals, but that the terminals will not do business with the agent *qua* agent. The terminals have offered another choice which the agents are free to accept or reject, that is, the terminals will serve the principal directly, but only if the transaction is secured in advance, or, the terminals will extend credit to the agents as independent contractors. By arranging for and using terminal facilities for vessels, without prior security having been furnished by the vessel owner or operator, the agents have accepted the terminals' offer and, as independent contractors using the terminals' facilities, the agents became bound by the terms and conditions of the tariffs.[31]

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31. This does not appear to be contrary to principles of Texas law. See comments at 2 Tex. Jur. 2d, Sec. 212:

> Ordinarily, however, though the facts of the case may be such as to put the third party on notice that the agent has a principal who must bear the liability, it is usually the agent's duty, if he would escape personal liability on the agreement, to make a

The understanding between the port and the agent has been reduced to a tariff provision, stating that the use of the port's facilities shall constitute a consent to the terms and conditions of the tariff and evidences the consent of the vessel agent to pay the tariff charges accruing to the vessel. At law, it is probably not necessary to include the provision in the tariff, although I have previously implied that it serves a useful regulatory purpose. Referring to virtually the same tariff provision, as is assailed here, in a Miami port tariff, Chief Judge Brown observed that it was "probably superfluous [that] the tariff contained a contractual consent clause." *State of Israel v. Metropolitan Dade County, Florida,* 431 F.2d 925, 927 (5 Cir. 1970). It is probably superfluous because, by making use of the terminal facilities in its own behalf, the agent impliedly consents to be bound by the tariff terms. This was confirmed in *Folgner v. Italian Line,* 383 F. Supp. 816 (D.C.C.Z. 1974), where the court stated, at 818:

> A party who makes use of the facilities or services offered by another, which are offered or rendered under the terms of a lawfully established tariff, impliedly consents to be bound by the tariff terms. Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 59 S.Ct. 612, 83 L.Ed. 953 (1939). The terms of a lawfully promulgated tariff become (in

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disclosure of the agency relationship himself, rather than to rely on any discovery of this fact by the third party. In any event, in cases of this character, the paramount question to be determined is simply this: To whom was the credit knowingly extended, according to the understanding of both parties to the contract? *For he to whom such credit was extended, knowingly and exclusively, by the other party to the Contract is the one who will incur liability on the agreement, regardless of whether he is the principal or the agent.* (Emphasis supplied.)

essence) the only agreement permitted between the party who supplies the facilities or services and the party who utilizes them. Union Wire Rope Corp. v. Atchison, T. & S.F. Ry., 66 F.2d 965 (8th Cir. 1933). These rules apply with equal force to tariffs governing terminal operations. United States v. ICC, 91 U.S.App.D.C. 178, 198 F.2d 958 (1952); State of Israel v. Metropolitan Dade County, Florida, 431 F.2d 925 (5th Cir. 1970).

The tariff places no unreasonable onus on the agent. If he wishes to avoid binding himself to the obligation to pay, he is free, under his agency agreement, to require the vessel owner to furnish satisfactory security to the port to cover all port charges properly allocated to the vessel in advance of berthing.

D: DURESS UNDER TEXAS LAW

WGMA calls upon the Commission to determine that under Texas law the provisions of the tariff making agents responsible for payment of wharfage constitutes duress and business coercion. Assuming, for the moment, that the tariff provision may be contrary to Texas law, because they impose duties and obligations on persons without their consent,[32] this issue is not before the convenient forum. Moreover, it is also incorrect to characterize the business relationship between the port and the

32. In view of the decisions by the Texas Supreme Court in *Rorie v. The City of Galveston*, 471 S.W.2d 789 (Tex. 1971), and by the United States District Court for the Southern District of Texas in *The City of Galveston v. Kerr Steamship Co., Inc., supra*, upholding tariff provisions virtually identical to those under attack here, see discussion, *infra*, it is rather doubtful that the duties and obligations of the agents to PHA would be construed as having been imposed by PHA by means of duress and business coercion under Texas law.

agents as non-consensual. As seen, the initial consent here arises not from the tariff provision but from the terms of the bargain struck by PHA and the agent whereby the agent's vessels are given the use of the port's facilities without a security deposit. Further, reliance on Texas law is not a proper basis for an adverse finding under the Shipping Act, particularly where, as here found, the tariff provisions pass muster under the Shipping Act. See *Agreement Nos. T-4, T-5,* 8 F.M.C. 521, 533-534 (1965); *Terminal Lease Agreement at Long Beach, California,* 11 F.M.C. 12, 26 (1967), where the Commission stated:

> While we might consider State or local law in determining what the public interest may be, we cannot in this case disapprove the agreements on this basis. The record does not show that any adverse ramifications will ensue upon approval of the agreements. Since we cannot anticipate any consequences which might be contrary to the public interest, the legality of the terms of the leases under California law is a matter for the State, not for the Commission in a section 15 proceeding.

The principle of those cases fully applies to this proceeding involving section 17 as well as section 15 issues.

E: THE SECTION 15 ISSUE

Complainant raises the section 15 issue at only one place in the text of its opening brief. The argument, in its entirety, is phrased by WGMA as follows:[33]

> Is not such relief of cargo and its representatives (as well as the port itself of course) of the cost of

33. WGMA's opening brief, p. 12.

collection, and liability for payment of, cargoes' charges clearly giving to the port, to cargo, and to cargoes' representatives "special privileges and advantages", expressly forbidden by Section 15 of the Shipping Act of 1916 (46 U.S.C.A. § 814) (if this be a matter of "agreement", as the tariff provision reads).

The short answer to the question posed is that a tariff is not an agreement within the meaning of section 15 but is governed by the provisions of 46 CFR 533.1 et seq. issued pursuant to section 17. This is the position of the Commission as it was stated in an amicus brief filed in *Rorie v. City of Galveston, supra,* and it was adopted by the Texas Supreme Court in that case. The Commission's position was upheld as "obviously most reasonable" in *The City of Galveston v. Kerr Steamship Co., Inc., supra,* 362 F. Supp. at 293, by the United States District Court for the Southern District of Texas. At issue in the *Kerr* case was a Galveston terminal tariff provision virtually identical to Item 3 of PHA's tariff, but concerning strike demurrage charged to the vessel. Galveston sued vessel owners and agents and therefore the principles enunciated there apply with full force and effect here, not only with regard to the section 15 issue, but the section 17 issue and the section 16 First[34] matter as well. The District Court concluded as a matter of law, 362 F. Supp. at 292-294:

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34. As stated earlier, section 16 First was not put in issue in the proceeding. Nevertheless WGMA argues that the tariff provisions are violative of its provisions, as an undue preference because the tariff shifts the burden of payment and collection of wharfage charges to vessel interests from cargo interest (payment) and PHA (collection). In essence, it is the same argument made by WGMA in regard to section 17. Neither section has been violated.

The tariff in question was promulgated by the Galveston Wharves to govern the operation of the wharves facility. First, although the statute is to be construed most broadly, Volkswagenwerk Akt. v. F.M.C., 390 U.S. 261, 88 S.Ct. 929, 19 L.Ed.2d 1090 (1968), a tariff is obviously not a multi-party agreement. Nothing in the record suggests that this tariff is anything other than a set of rates, rules and regulations unilaterally issued by the owner of the facility. Secondly, *neither the tariff provisions relevant here, nor any other tariff provision, fit the categories enumerated in the statute* [*section 15*]. In Rorie v. City of Galveston, 471 S.W.2d 789 (Tex. 1971), the Texas Supreme Court adopted the view that Section 15 of the Shipping Act does not apply to a Galveston Wharves tariff. The court there enforced a provision in a predecessor to Circular No. 4-D against the claim of unenforceability for lack of F.M.C. approval under Section 15.

Counsel for the Federal Maritime Commission filed an amicus brief in the *Rorie* case supporting enforcement of the statute. Although the courts are the final authority on issues of statutory construction, F.T.C. v. Colgate-Palmolive, 380 U.S. 374, 385, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965), the construction put on a statute by the agency charged with administering it is entitled to deference by the courts. N.L.R.B. v. Hearst Publications, 322 U.S. 111, 131, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). This is particularly so if the construction has been consistent and of long duration.

In the amicus brief, the Commission contended *the tariff was not an agreement within the meaning of Section 15 but was instead governed by the Commission's General Order 15*, 46 C.F.R. § 533, issued pursuant to Sections 17 and 21 of the Shipping Act, 46 U.S.C. §§ 816, 820. That order requires all persons carrying on the business of furnishing wharfs,

docks, warehouses, or other terminal facilities to file a schedule or tariff showing all rates, charges, rules and regulations governing the operation of the facility with the F.M.C. The order does not require the Commission's explicit approval of any tariff. The Commission reviews the filed tariff, considers any objections and contacts the filing party if any changes are necessary. The predecessor to the Galveston tariff was challenged and upheld in Selden & Co. v. Galveston Wharves, 7 FMC 679, 1964 A.M.C. 1621 (1964).

The Commission's interpretation of the Act is obviously most reasonable. Section 15 (46 U.S.C. § 814) applies to a broad range of agreements between parties who are subject to the Act. This section requires filing and approval of such agreements by the Commission. Section 17 (46 U.S.C. § 816) and the Commission orders issued pursuant thereto apply to unilaterally fixed rates, rules and regulations. This section requires filing but no formal approval. Tariff Circular No. 4-D plainly falls into the second category; it must be filed but needs no formal approval to be enforceable.

* * *

In accord with Item # 30 of the Tariff, pier demurrage charges for cargo remaining beyond free time may be assessed *against vessels and their agents.*

Defendants refer to the Item # 5 definition of pier demurrage as "a charge assessed against cargo remaining in or on the terminal facilities after the expiration of free time unless arrangements have been made for storage." Defendants also point to other charges which are charged against the vessel. Defendants conclude that these definitions preclude plaintiff from charging vessels or vessel agents with pier demurrage.

The definitions only deal with the manner in which charges are accrued. They do not purport to establish which parties are liable for the charge. Liability for the various charges is fixed by Item # 30 of the Tariff, quoted in Findings of Fact 1. Items # 5 and # 30 are neither conflicting nor ambiguous.[35]

A provision with similar language to that of Item # 30 was found effective and binding on the parties in Selden & Co. v. Galveston Wharves, supra.

Obviously, the charge which the City of Galveston assesses against a party must be reasonably related to the party's use of the facility. As discussed in Findings of Fact 5, 6 and 7, *assessment of pier demurrage against the vessel's agent is a reasonable charge.* (Emphasis supplied.)

F: THE 4% ALLOWANCE

In its complaint, but not in its opening brief, WGMA alleges the 4% allowance to be a "pittance." I have previously found it to be reasonably compensatory.

Nevertheless, the tariff issued by PHA does require it to pay vessel interests a 4% allowance for collection and payment of wharfage charges. PHA must comply with the terms and conditions of its own tariff. Although PHA, pursuant to written leases with some cargo interests, collects wharfage directly from them, and does not pay the 4% fee to vessel interests which attempt to collect wharfage in those situations, the facts of record show that the vessel interests have complied with the tariff's require-

35. Similarly, I find that Item No. 3 of PHA's tariff is not ambiguous and does not conflict with other provisions in its tariff or with 46 CFR 533.1 et seq. Nevertheless, I believe the language of Item No. 3 can be improved to reflect its intended result. I would change "Wharfage Charges . . . are liabilities of the owner of the cargo" to "Wharfage Charges are assessed against the cargo."

ments and should be paid the fee, in accordance with Item 3.2 of the tariff, for wharfage paid directly to PHA by lessees. Therefore, unless and until PHA changes the terms of Item 3.2,[36] PHA will be required to pay the allowance to vessel interests, prospectively and retroactively.

G: TERMINAL CHARGE

Item No. 59 of PHA's tariff publishes rates for what is called a Terminal Charge. That term is not defined in PHA's tariff. The record fails to disclose what service is rendered or what facility is provided to justify the charge. However, the lawfulness of the charge was not placed in issue and PHA was not obligated to come forward with evidence to show the kind of service or facility it offered to earn that charge. Nevertheless, the Commission's tariff regulations applicable to terminal operators, 46 CFR 533.1 et seq., do require terminal tariffs to set forth a definition of all services or facilities provided, 46 CFR 533.6. PHA is remiss in this regard insofar as the definition of terminal services is concerned and is admonished to correct the situation forthwith.

H: SUMMARY OF THE DOMINANT ISSUES

The practice of placing liability for payment of wharfage charges on vessel owners and vessel agents is prevalent at many United States ports and in all probability the practice has been dictated by the same considerations shown here, that is: the carrier is the user of the facility

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36. Inasmuch as the issue is not before me, I express no opinion concerning the validity of a particular change deleting the allowance in a written lease situation.

pursuant to its transportation obligation and port efficiency is promoted by having the agent agree to be responsible for payment of the vessel's charges for the use of the facility. The record discloses that virtually identical tariff provisions reflecting the practice appear in tariffs published by terminals at the ports of New Orleans, Lake Charles, Corpus Christi and Port Arthur. In addition, court and Commission cases reveal that nearly identical tariff provisions have been reviewed without being found in violation of law at Galveston, Miami and Puget Sound. There is nothing in the record to warrant a different conclusion in regard to PHA's tariff.

One other comment is warranted. In bringing this complaint proceeding, WGMA is, essentially, relitigating the issues in *The City of Galveston v. Kerr, supra,* and *Rorie v. The City of Galveston, supra,* and contending that the decisions handed down in those cases are wrong and should be overturned. The proper method to be used to achieve that result is to distinguish those cases from the proceeding at bar on the facts or the law. That method would be particularly appropriate in this proceeding in the light of WGMA's insistence that, over and beyond Shipping Act issues, the action of PHA contravenes Texas law. In these circumstances it is remarkable that WGMA makes no attempt to explain why the *Rorie* and *Kerr* cases should not be controlling or, at least, not be persuasive. Indeed, WGMA totally ignores *Rorie* and *Kerr* in its opening and reply briefs, having failed to cite either case or the conclusions reached by the Texas Supreme Court and the United States District Court for the Southern District of Texas in those cases.

CONCLUSION

I find that the practices of the Port of Houston Authority of Harris County, Texas, and the provisions of its tariff, Item Nos. 2, 3, 3.2 and 3.3, which dictate the practices and are in issue in this proceeding directly or indirectly, and which make the vessel, vessel owners and vessel agents responsible for payment of wharfage charges, do not violate sections 15, 16 First or 17 of the Shipping Act, 1916.

I find that PHA has inadvertently failed to comply with Item No. 3.2 of its tariff in that it has not paid the appropriate vessel interests the 4% allowance for wharfage charges paid directly to PHA by persons occupying facilities under written leases from PHA.

ORDER

It is ordered that the complaint is dismissed and the proceeding is discontinued.

It is further ordered that PHA make payment prospectively and retroactively, of the 4% allowance to the appropriate vessel interests for wharfage charges collected by PHA from lessees, occupying facilities pursuant to written leases with PHA, in accordance with the terms of Item No. 3.2 of PHA's tariff.

/s/ SEYMOUR GLANZER
Seymour Glanzer
Administrative Law Judge

Washington, D. C.
April 12, 1978

Supreme Court, U. S.
FILED
JUL 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1646

In the Supreme Court of the United States

OCTOBER TERM, 1979

WEST GULF MARITIME ASSOCIATION, PETITIONER

v.

PORT OF HOUSTON AUTHORITY,
FEDERAL MARITIME COMMISSION AND
THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. The Port of Houston Authority ("PHA") is a governmental agency of the State of Texas which owns and operates the public facilities at the Port of Houston. Texas law requires PHA to establish fees and charges for use of the port sufficient to produce the revenue necessary to carry out its responsibilities.

From at least 1933 to 1964, PHA billed and collected wharfage from vessels and their agents, although it considered the charge as accruing to cargo (Pet. App. A-

7, A-27).[1] In response to requests made by the vessel owners and agents, PHA changed its wharfage billing and collection practices in 1964 by shifting liability for wharfage charges to the cargo interests exclusively (Pet. App. A-7). The new system, however, proved inordinately expensive due to the need to bill each shipment individually, rather than billing on a per vessel basis (*id.* at A-30). In addition, charges often were uncollectable, because the information needed for proper billing was not available until after the cargo left the terminal, and the persons liable for payment were overseas (*id.* at A-30 to A-32).

These difficulties led PHA to reinstitute, over the protests of petitioner West Gulf Maritime Association,[2] the practice of billing the vessel interests for wharfage charges. Its new tariff, issued in 1975, obliged them to guarantee collection and allowed vessels and vessel agents a four percent "discount" on the charges collected as compensation (*id.* at A-8, A-23, A-28).[3]

Petitioner filed a complaint with the Commission contending that these billing practices were unjust and

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[1]Federal Maritime Commission regulations define wharfage as (46 C.F.R. 533.6(d)(2)):

> A charge assessed against the cargo or vessel on all cargo passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water), when berthed at wharf or when moored in slip adjacent to wharf. Wharfage is solely the charge for use of wharf and does not include charges for any other service.

[2]West Gulf is a trade association composed of almost all steamship agents representing the operators of deep-sea cargo vessels using the ports of the Gulf of Mexico from Lake Charles, Louisiana, to Brownsville, Texas. It also includes some vessel owners and stevedoring firms (Pet. App. A-4).

[3]Similar tariff provisions are in effect at other major Gulf Coast ports in Texas and Louisiana (Pet. App. A-28 to A-29).

unreasonable under Section 17 of the Shipping Act of 1916 (46 U.S.C. 816). The administrative law judge (Pet. App. C) and the Commission (Pet. App. B) upheld them. The court of appeals affirmed without opinion (Pet. App. A).

2. Petitioner contends (Pet. 8-13) that PHA's tariff is unlawful because it conflicts with Texas law. It argues that requiring vessel agents to collect wharfage charges owing to PHA has the effect of requiring the vessel agents to become the agents of PHA without their consent, and without an agreement in writing, in violation of Texas law. But whether or not that is so, it does not follow that PHA's tariff is unreasonable under Section 17 of the Shipping Act of 1916 (46 U.S.C. 816; Pet. 4-5). As the Commission observed: "The simple answer to * * * these assertions is that, while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not alone dispositive of Shipping Act issues, absent a showing that these principles directly apply to Shipping Act considerations" (Pet. App. A-15). Congress has not delegated to the states, rather than to the federal administrative agency charged with developing the nation's maritime policy, the controlling decision making authority with respect to the reasonableness of the regulations and practices of port facilities serving vessels moving in interstate and foreign commerce.

Here, the Commission was clearly correct in finding that PHA's practice of requiring vessels and vessel agents to guarantee wharfage charges was reasonable, whatever the incidental impact of state law considerations. The practice of billing vessel agents for wharfage charges was followed by PHA from at least 1933 through 1964, and has been in effect again in Houston since 1975 (Pet. App. A-27 to A-28). A similar practice by the Port of New

Orleans goes back at least to World War I and probably earlier (Pet. App. A-28 to A-29), and the Commission has approved the same practice in Boston and San Diego (*id.* at A-36 to A-40). Moreover, Commission regulations expressly recognize that wharfage charges may properly be assessed against the cargo or vessel (46 C.F.R. 533.6(d)(2); Pet. App. A-24 n.9); *American President Lines, Ltd.* v. *Federal Maritime Bd.*, 317 F.2d 887, 888 (D.C. Cir. 1962); *Boston Shipping Ass'n* v. *Port of Boston Marine Terminal Ass'n*, 11 F.M.C. 1, 9 (1967)).

The thorough opinion of the presiding officer who conducted the hearing before the Commission in this case demonstrates the efficiencies in collection realized as a result of PHA's looking to the vessel or vessel agent for wharfage charges attributable to the vessel rather than to the shippers of each lot of cargo that may be on board (Pet. App. A-29 to A-33). Petitioner does not challenge the sufficiency of the evidence supporting this conclusion. In addition, PHA gives vessels and vessel agents a four percent allowance to compensate them for the collection of charges, the reasonableness of which petitioner also does not challenge. Finally, as the Commission recognized (*id.* at A-13), the vessels and their agents *are* the users of the port facilities, and it is entirely reasonable that they and their agents should be responsible for payment of wharfage fees. Compare *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520-521 (1939).

In any event, petitioner's members are hardly the victims of commercial duress with respect to the condition of the tariff that they guarantee the payment of wharfage. The published tariff simply operates as a unilateral offer to contract, and by using the terminal facilities, the vessels

and their agents accept the offer.[4] The cases cited by petitioner on "implied duress" under Texas law (Pet. 11), even assuming they have any relevance here, hold only that a person who pays taxes or utility bills under certain circumstances does not waive his right to seek recovery of any overpayment. *Texas Power & Light Co.* v. *Doering Hotel Co.*, 147 S.W. 2d 897 (Tex. Civ. App. 1941), aff'd, 139 Tex. 351, 162 S.W. 2d 938 (1942); *Austin Nat'l Bank* v. *Sheppard*, 123 Tex. 272, 277-278, 71 S.W. 2d 242, 245-246 (Comm'n App. 1934). The ultimate right to recovery in those cases depended on the substantive illegality of the exactions, not on the fact that they had been collected under duress. In this case the Commission correctly upheld the reasonableness of the tariff in question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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JULY 1980

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[4]The terms of tariffs filed by terminal operators with the Commission become part of any agreement for use of terminal facilities. *Rorie* v. *City of Galveston*, 471 S.W. 2d 789, cert. denied, 405 U.S. 988 (1972); *City of Galveston* v. *Kerr Steamship Co.*, 362 F. Supp. 289 (S.D. Tex. 1973), aff'd mem., 503 F.2d 1401 (5th Cir. 1974), cert. denied, 420 U.S. 975 (1975).

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-versus-

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PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS,
Intervenor

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF INTERVENOR PORT OF HOUSTON AUTHORITY IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1646

WEST GULF MARITIME ASSOCIATION,
Petitioner

-versus-

FEDERAL MARITIME COMMISSION, ET AL.,
Respondent

PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS,
Intervenor

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF INTERVENOR PORT OF HOUSTON AUTHORITY IN OPPOSITION

To The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Intervenor, Port of Houston Authority of Harris County, Texas, urges that the Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the

District of Columbia Circuit entered in the above cause be denied. All references to appendices contained herein are those appended to the Petition, pages A-1 through A-61.

OPINIONS BELOW

Petitioner's description of the Opinions Below is substantially correct.

JURISDICTION

Intervenor does not contest the jurisdiction of this Court as invoked by the Petition for Writ of Certiorari.

QUESTION PRESENTED

The Port of Houston Authority of Harris County, Texas ("Authority") is a governmental agency and body politic, a political subdivision of the State of Texas. It owns and operates the public port facilities at the Port of Houston, Texas. It is a navigation district of the State of Texas vested with all the lawful powers of such districts. For at least during the period from approximately 1933 to 1964, wharfage charges (the charges on cargo passing or conveyed over, onto, or under wharves or between vessels) due the Port of Houston Authority were billed to and collected from the vessel, its owners or agents, by the Harris County Houston Ship Channel Navigation District, the former name of the Authority. During that period, Item 3(c) of the Authority's publicly published tariff read substantially as follows:

> "All vessels and their owners receiving any commodity on a wharf or in a transit shed, or loading

> or unloading any commodity while at a wharf, hereby contracts to pay and are responsible for the wharfage on such commodities, at the rate provided herein, to be collected either from vessels, their owners or their agents." (Appendix C, p. A-27)

During that entire period wharfage charges were billed to and collected from the vessels, vessel owners or vessel agents by the Authority.

That same Item 3(c) was changed effective April 1, 1964, and until July 1, 1975 read substantially as follows:

> "Liability for wharfage charges, set forth in Item Number 65, will be the responsibility of the owner of the cargo and the Port Authority will invoice and collect from such owner or authorized agent." (Appendix C, p. A-28)

During that entire period, wharfage charges were billed to and collected from the owners of the cargo, or their representatives.

In April, 1973 the Authority, which until then had been performing as an operating terminal, loading and unloading cargoes to and from vessels and land carriers, ceased such operations. At that time the Authority advised vessel owners and agents that it contemplated a further change in its wharfage billing practices by way of reversion to tariff provisions similar to those in effect prior to April, 1964. That change was implemented, effective July 1, 1975, to revise the wording of Item 3 as follows:

> "3. Terminal Charges, set forth in Item No. 59, and Wharfage Charges, set forth in Item No. 65, are liabilities of the owners of the cargo; however,

the collection and payment of same to the Port Authority must be guaranteed by the vessel, her owners and agents, and the use of Port Authority facilities by the vessel, her owners and agents, shall be deemed an acceptance and acknowledgement of this guarantee.

3.2 As compensation to said vessel, her owners and agents, for such collection and payment of terminal and wharfage charges, as specified in Items 59 & 65, the Port Authority shall pay a fee of four per cent (4%) of the total terminal and wharfage charges incurred and billed to the vessel, her owners and agents.

3.3 Wharfage charges on cargo shall be assessed on the basis of manifest weights, unless otherwise provided herein." (Appendix C, p. A-23)

This most recent change by the Authority in its wharfage billing practices is not unique. The tariff provisions quoted last above are virtually identical to provisions of the tariff of the Port of New Orleans, Louisiana, which date back at least to a time before World War I, and probably to the creation of the port in 1896. Similar provisions, without the inclusion of a fee for collection, also appear in tariffs published by the Port of Lake Charles, Louisiana, the Port of Corpus Christi, Texas and the Port of Port Arthur, Texas since at least 1968, 1974 and 1972, respectively (Appendix C, pp. A-28, 29). The West Gulf Maritime Association (WGMA), the members of which serve one or more of the above mentioned ports in addition to the Port of Houston, filed its complaint with the Federal Maritime Commission seeking to have these most recent tariff provisions declared unjust, unreasonable, discriminatory and unlawful. The de-

cision of the Administrative Law Judge (Appendix C, p. A-20) and of the Commission (Appendix B, p. A-3) upheld the validity thereof and the United States Court of Appeals for the District of Columbia Circuit, after according the issues presented full consideration, affirmed (Appendix A, pp. A-1, 2).

The sole question presented is: (1) Whether the Federal Maritime Commission, the body having primary responsibility for the administration and enforcement of the Shipping Act of 1916 (46 U.S.C. 801, et seq.) correctly found the provisions of Intervenor's tariff to be just and reasonable regulations and practices within the terms of Section 17 of that Act (46 U.S.C. 816).

STATUTES AND REGULATIONS INVOLVED

The statement of Statutes and Regulations Involved as set out in the Petition is correct as far as it goes. The Statement is notable however for omission of the provisions of the Texas Water Code authorizing navigation districts such as Intervenor to build, own and operate facilities common to public ports, Section 60.101, and placing upon it the burden to fix charges sufficient to produce revenues to pay its expenses, Section 60.103.

STATEMENT OF THE CASE

Intervenor agrees that Petitioner's Statement substantially summarizes the case, but would respectfully show that it fails to acknowledge that tariff provisions and practices virtually identical to those complained of herein by Petitioners were in effect during a period at least from 1933 to 1964, have been in effect at the Port of New Orleans, Louisiana at least since before World War

I and probably since 1896 and are in effect now; and also are presently in effect at the Ports of Lake Charles, Louisiana, Corpus Christi, Texas and Port Arthur, Texas.

REASONS FOR DENYING THE WRIT

A.

SUGGESTION OF THE ABSENCE OF A QUESTION OF SUBSTANTIAL IMPORTANCE

Intervenor respectfully suggests that the facts and issues presented herein wholly fail to present any question of significant importance and which would be in the public interest to have decided by the Court of last resort of the United States. The essence of Petitioner's complaint is that tariff provisions virtually identical to those Petitioner's members have been abiding by at the Port of New Orleans, Louisiana since prior to World War I are unjust and unreasonable and hence proscribed by Section 17 of the Shipping Act of 1916 (46 U.S.C. 816). After full consideration, the Federal Maritime Commission, the agency primarily responsible for administration of the Act, and the Court of Appeals for the District of Columbia Circuit resolved that issue against Petitioner. The issue here presented is neither of sufficient importance nor sufficiently in the public interest, to warrant the time and attention of this Honorable Court. It is at best of interest only to the parties hereto, and the Petition should therefore be denied. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 58 S.Ct. 860, 82 L.Ed. 1290 (1938); *Magnum Import Co. v. Coty*, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923).

B.

THE TARIFF PROVISIONS CHALLENGED HEREIN ARE NOT VIOLATIVE OF THE LAWS OF THE STATE OF TEXAS, THE COMMON LAW, OR OF THE SHIPPING ACT OF 1916 (46 U.S.C. 801, et seq.).

Petitioner's assertions to the contrary notwithstanding, the Federal Maritime Commission did not decide that principles of state and common law may only be given consideration as "evidence" in reaching a decision as to whether a given regulation is just and reasonable. The Commission did state, in the course of its opinion, that

> ". . . while tenets of state and common law may be evidence of reasonableness and of local business practices, they are not *alone* dispositive of Shipping Act issues, *absent a showing that these principles directly apply to Shipping Act considerations . . .*" (emphasis added)

The Commission then found on the basis of the evidence before it that Petitioner did not demonstrate that the asserted effect of Texas or Common Law have such direct application (Appendix B, p. A-15). The Commission also fully considered the merits of Petitioner's arguments in this regard, and resolved them against Petitioner. During the course of such consideration the Commission pointed out the choice available to Petitioner between the public facilities operated by the Authority and private facilities located elsewhere at the Port of Houston. Petitioner is not confined to use of the facilities of the Authority at the Port of Houston.

In addition to the foregoing, Petitioner misstates what it offers as the applicable Texas law. Reference to the

decisions in *City of Galveston v. Kerr Steamship Company,* 362 F. Supp. 289 (S.D. Tex., 1973); aff'd. per curiam 503 F.2d 1401 (C.A. 5, 1974) cert. denied, 420 U.S. 975 (1975) and *Rorie v. The City of Galveston,* 471 S.W.2d 789 (Tex. 1971) cert. denied, 405 U.S. 988, 92 S.Ct. 1250, 31 L.Ed.2d 454 (1972), both of which are based on Texas law, reveals that both cases affirmed the imposition of unilaterally promulgated tariff terms upon parties unwilling to accept the force of law behind those provisions. Virtually the same contention Petitioner makes here was made in the *Kerr* case and at 362 F. Supp. 293, 294, the Court stated:

> "The Defendants refer to Item #5 definition of pier demurrage as 'a charge assessed against cargo remaining in or on terminal facilities after the expiration of free time unless arrangements have been made for storage.' Defendants also point to other charges which are charged against the vessel. Defendants conclude that these definitions preclude Plaintiff from charging vessels or vessel agents with pier demurrage.
>
> "The definitions only deal with the manner in which charges are accrued. They do not purport to establish which parties are liable for the charge. Liability for the various charges is fixed by Item #30 of the tariff quoted in Finding of Fact 1. Items #5 and #30 are neither conflicting nor ambiguous."

In addition to the fact that the record reflects the practice complained of herein by Petitioner has been followed for many years at other ports on the Gulf of Mexico, the Federal Maritime Commission has previously considered similar provisions, and has found them

not to be unlawful. Shifting the responsibility for the collection and payment of such charges does not constitute an unjust and unreasonable practice within the meaning of Section 17 of the Shipping Act of 1916. *Boston Shipping Association, Inc. et al. v. Port of Boston Marine Terminal Association and Massachusetts Port Authority,* 11 F.M.C. 1 (1965) and *Boston Shipping Association, Inc., et al. v. Port of Boston Marine Terminal Association, et al.,* 10 F.M.C. 409 (1967).

Petitioner also misstates Texas law with regard to duress and business coercion. It has long been the law in Texas that duress

> ". . . cannot exist without there being a threat to do some act which the threatening party has no legal right to do—some illegal execution or some fraud or deception. The restraint must be imminent and such as to destroy free agency without present means of protection."

The foregoing is from the 1922 decision of the Texas Commission of Appeals in *Ward v. Scarborough,* 236 S.W. 434 (Tex. Com. App. 1922).

The requirements of the Statutes of Fraud are not at issue in this matter, as is demonstrated by Petitioner's Statement of the Question, at page 11 of the Petition for Writ of Certiorari where complaint is made of the tariff provision as requiring one party to answer for the debt of another. This contention was examined in depth both by the Administrative Law Judge and by the Federal Maritime Commission, and both decisions emphasized that the vessel agents in fact make arrangements for vessel berthing directly with the terminal

operator, and in so doing, incur the obligation to pay the tariff charges in question. (Appendix C, p. A-36, et seq. and Appendix B, p. A-16, 17). The Commission emphasized that the justness and reasonableness of the regulations challenged is best demonstrated by the prior course of conduct, normal business practices, and continuing and voluntary use of the facilities by the vessel agents. The Commission pointed to the prior practice between the parties of the agents having to establish independent credit arrangements with the Port Authority on behalf of their principals (Appendix B, p. A-16, 17). As the Commission pointed out, even without the prior course of conduct, agency law does not prohibit an offeror of services to the public to condition the rendering of such services to any party upon that party agreeing to be responsible for the charges for such services regardless of whether the service is sought on their own behalf or for a principal, and whether or not disclosed. It is further observed that an agreement may thereby arise outside the scope of the agent's agreement with its principal that is not controlled by agency principles. That is exactly the situation presented by Petitioner and is exactly the situation contemplated by the tariff provisions at issue which require such an agreement by an agent so utilizing the facility. *Folgner v. Italian Line,* 383 F. Supp. 816, 818 (D.C.C.Z., 1974). The agent may obtain indemnification from its principal or it may require its principal to furnish advance security (Appendix B, p. A-17). The evidence below indicates that in the vast majority of the cases advance security is in fact secured from the principal by the agent.

A valid business need has been demonstrated for the tariff provisions in question. They have been shown to

constitute just and reasonable regulations and to be fit and appropriate to the end in view. *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525 (1966); *Boston Shipping Association, Inc., et al. v. Port of Boston Marine Terminal Association and Massachusetts Port Authority,* 11 F.M.C. 1 (1965). Having determined in good faith that practical considerations warranted a change in its billing and collection practices, Intervenor, a terminal operator, must remain free to change its tariff provisions providing therefor when circumstances warrant. *Selden & Company v. Galveston Wharves,* 7 F.M.C. 679 (1964). Unilaterally promulgated tariff provisions have been examined by the courts in the past and have not been found wanting. *Rorie v. The City of Galveston,* 471 S.W.2d 789 (Tex., 1971) cert. denied, 405 U.S. 988, 92 S.Ct. 1250, 31 L.Ed.2d 454 (1972); *City of Galveston v. Kerr Steamship Company,* 362 F. Supp. 289 (S.D., Tex., 1973); aff'd. per curiam 503 F.2d 1401 (C.A. 5, 1974) cert. denied, 420 U.S. 975 (1975).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari previously filed herein should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that service of three copies of Intervenor's Brief in Opposition to the Petition for Writ of Certiorari has been made on each of the following named persons, by air mail, postage prepaid:

1. Solicitor General
   United States Department of Justice
   Washington, D. C. 20530
2. Mr. Robert Nicholson
   United States Department of Justice
   Washington, D. C. 20530
3. Mr. Edward Gruis
   Office of General Counsel
   Federal Maritime Commission
   1100 "L" Street, N. W.
   Washington, D. C. 20573
4. Mr. George H. Hearn
   Messrs. Hill, Rivkins, Carey,
   Loesberg and O'Brien
   72 Wall Street
   New York, New York 10005

Service of three copies of said document was also made on the following named person by United States Mail, postage prepaid:

5. Mr. Robert Eikel
   1442 Esperson Building
   Houston, Texas 77002

Dated at Houston, Texas this _____ day of May, 1980.

F. WILLIAM COLBURN
Attorney for Intervenor
Port of Houston Authority